IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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SUPREME COURT, U.S.

NO. 82-5576

JEFFREY LEE PICKETT, by next friend,
FRANCES ANNETTE PICKETT, and
FRANCES ANNETTE PICKETT

v.

BRAXTON BROWN, Appellee

and

WILLIAM M. LEECH, JR., Intervenor-Appellee

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

JURISDICTIONAL STATEMENT

October, 1982

Harold W. Horne
Counsel for Appellant

Horne & Peppel, P.C.
474 S. Perkins Extd.
Suite 205
Memphis, Tennessee 38117
(901) 761-3140

QUESTIONS PRESENTED

1. Whether Tennessee Code Annotated § 36-224(2) violates the Fourteenth Amendment of the constitution of the United States by creating an illegitimacy classification, based upon welfare status, that denies the appellant, an illegitimate child not receiving state welfare, the right to sue for paternal support while imposing no such restriction on illegitimate children who are similarly situated, but who receive welfare, said classification bearing no relationship to an important state interest.

2. Whether Tennessee Code Annotated § 36-224(2) violates the Fourteenth Amendment of the constitution of the United States by creating an illegitimacy classification that denies the appellant, an illegitimate child, the right to sue for paternal child support while imposing no such restriction on legitimate children, similarly situated, and without bearing relationship to an important state interest.

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OPINIONS BELOW

The opinion of the trial court finding Tennessee Code Annotated § 36-224(2) unconstitutional is not reported and may be found in the appendix at pages 27-34.

The opinion of the Supreme Court of Tennessee reversing the trial court and upholding the statutes constitutionality is reported at _____S.W. 2d _____ and may be found in the appendix at pages 1-26.

GROUNDS FOR JURISDICTION

NATURE OF PROCEEDING:

This is a paternity case filed pursuant to Tennessee Code Annotated § 36-224. Suit was brought by the minor illegitimate child - by and through his mother.

The defendant moved the court to dismiss the suit based upon Tennessee's statute of limitations as set out in Tennessee Code Annotated § 36-224(2). At the earliest stage possible, appellant raised the claim, in response to the motion to dismiss, that § 36-224(2) of the Tennessee Code violates the constitutional rights of illegitimate children, and that such statute violates those rights set out in the United States Constitution by the Fourteenth Amendment. The trial court ruled said statute was unconstitutional. The defendant and the Attorney General of Tennessee appealed the trial court's ruling to the Supreme Court of Tennessee.

JUDGMENT SOUGHT TO BE REVIEWED:

The Fourteenth Amendment claim was reiterated by appellant before the Supreme Court of Tennessee. On August 30, 1982, the Supreme Court reversed the trial court's opinion stating: ". . . The rulings of the trial court are reversed and this action is dismissed."

The Supreme Court cited Mills v. Habluetzel, 102 S.Ct. 1549 (1982), in rendering its opinion, stating at page 21, (appendix page 22) lines 5-20:

> "The Mills case definitely holds that the expressed state interest in having a statute of limitations upon paternity actions - preventing litigation of stale and fraudulent claims - is a valid one. It has held that one year is as a matter of law too short a time for the mother to make a decision, because of financial, emotional, and, we might add, physical strains and problems which very often endure through many months after childbirth. Even though these and other circumstances might also endure beyond the first year, we cannot say as a matter of law that the legislature could not rationally determine that such a possibility became outweighted by the state's interest in prohibiting litigation of stale and fraudulent claims. The legislature could rationally determine that two years is long enough for most women to have recovered physically and emotionally, and to be able to access their and their children's situations logically and realistically.

On the other hand, the Supreme Court of Tennessee on the same date, August 30, 1982, filed an unreported opinion, Tennessee Department of Human Services, Assignee of Delores Anne King vs. Luther Leon Lumley, stating at page 4 (appendix page 39), lines 18-23:

> That is to say, Pickett holds that T.C.A. § 36-224(2) creates an exception to the general two-year limitation period in paternity

actions; and that in any case where the child is or is likely to become a public charge, suit may be filed by the Department of Human Services throughout the eighteen years after the birth of the child.

From Pickett, appendix page 23, lines 12-14:

> * * * * The state's counterveiling interest in doing justice and reducing the number of people on welfare is served by allowing the state a longer time during which to sue.

The court brushed aside the issue raised by the fact that in all other cases in Tennessee the statute of limitations is tolled during the child's minority. At page 22 (appendix page 23), lines 20-25 the court stated:

> * * * This leaves the court's concern that the limitation period is unique in not being tolled during the plaintiff's minority, but we do not find that this factor alone requires a holding of unconstitutionality of a two year period, as opposed to any other period which can end during the plaintiff's minority."

The Supreme Court of Tennessee thus considered and expressly rejected the federal constitutional claims.

On September 9, 1982, appellant filed a notice with the Supreme Court of Tennessee that the opinion would be appealed to the United States Supreme Court.

JURISDICTIONAL STATUTE:

This appeal is docketed in this court within ninety (90) days from the final order of the Supreme Court of Tennessee upholding the constitutionality of Tennessee Code Annotated § 36-224(2). The jurisdiction of this court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

PERTAINING TO APPEAL

1. The Fourteenth Amendment, United States Constitution:

> . . . no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .

2. Tennessee Code Annotated § 36-224(1) & (2):

> (1) A petition to establish paternity of a child, to change the name of the child if it is desired, and to compel the father to furnish support and education for the child in accordance with this chapter may be filed by the mother, or her personal representative, or, if the child is likely to become a public charge by the state department of human services or by any person. Said petition may be filed in the county where the mother or child resides or is found or in the county where the putative father resides or is found. The fact that the child was born outside this state shall not be a bar to filing a petition against the putative father. After the death of the mother or in case of her disability said petition may be filed by the child acting through a guardian or next friend.
>
> (2) Proceedings to establish the paternity of the child and to compel the father to furnish support and education for the child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the lapse of more than two (2) years from the birth of the child, unless paternity has been acknowledged by the father in writing or by the furnishing of support. Provided, however, that the department of human services or any person shall be empowered to bring a suit in behalf of any child under the age of 18 who is, or is liable to become a public charge.

3. Tennessee Code Annotated, § 28-1-106:

> If the person entitled to commence an action is, at the time the cause of action accrued * * * within the age of eighteen (18) years * * * such person, or his representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from the removal of such disability.

STATEMENT OF THE CASE

Frances Annette Pickett filed a petition to establish paternity pursuant to Tennessee Code Annotated § 36-224, alleging that Braxton Brown is the natural father of her son, Jeffrey Lee Pickett, born November 1, 1968. This petition was filed May 24, 1978. The purpose of the suit was to establish the parent-child relationship between Braxton Brown and Jeffrey Lee Pickett and to obtain child support for said child.

Braxton Brown denied paternity and moved to dismiss the petition based upon the two year statute of limitations set out in Tennessee Code Annotated § 36-224(2). In response to the motion to dismiss, Frances Pickett filed a motion challenging the constitutionality of Tennessee Code Annotated § 36-224(2) and moved the court to amend the petition to be brought in the name of her son. The attorney general of Tennessee intervened to uphold the constitutionality of the state statute.

The parties stipulated that Jeffrey Lee Pickett was not a public charge, and that the defendant, Braxton Brown, had never acknowledged said child nor provided support.

The Honorable Kenneth A. Turner, Judge, overruled the defendant's motion to dismiss declaring said statute to be unconstitutional. The trial court found that the statute discriminated against illegitimate as opposed to legitimate children and that the statute also discriminated against illegitimate children not receiving welfare as opposed to illegitimate children who were a public charge. The judge

further ordered that the petition be brought in the name of the minor child by Frances Pickett as next friend. This order was entered April 24, 1980 (see appendix for full opinion, pages 27-34).

The state of Tennessee and the defendant appealed the trial court's ruling to the Supreme Court of Tennessee. On August 30, 1982, the Supreme Court of Tennessee entered an opinion which upheld the constitutionality of the two year statute of limitations in non-welfare cases. The trial court's opinion was reversed and the petition to legitimate the child was dismissed.

THE QUESTION IS SUBSTANTIAL

The questions as to whether a two year statute of limitations on paternity actions invidiously discriminates against illegitimate children so as to deny them due process and equal protection due under the Fourteenth Amendment is substantial. It has never been decided by this court,[1] although Texas' one year statute of limitations was declared unconstitutional in Mills v. Habluetzel, 102 S.Ct. 1549 (1982).

The fact that there are potentional constitutional problems which exist with a statute of limitations on paternity actions appeared to be acknowledged by this court in

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1. In Cessna v. Montgomery, 344 N.E. 2d 447 (Ill. 1976); State v. Witkowski, 256 N.W. 2d 216 (Iowa 1977); and Thompson v. Thompson, 404 A. 2d 269 (Md. 1979) the state supreme courts upheld the constitutionality of two (2) year statute of limitations in paternity cases.

However, in State v. Wilson, 634 P. 2d 172 (Mont. 1981); Stringer v. Dudoich, 583 P. 2d 462 (N.M. 1978); State v. West, 378 So. 2d 1220 (Fla. 1979); and County of Lenoir v. Johnson, 264 S.E. 2d 816 (N.C. 1980) the state supreme courts held that statute of limitations ranging from two to four years in paternity cases violated the federal constitution.

footnote 5 to the decision in Lalli v. Lalli, 439 U.S. 259 (1978). In that footnote, the court noted that the constitutionality of New York's two year statute of limitations was not before the court in that case because the New York Court of Appeals had not passed on it. Further, the court noted several times in the case of United States v. Clark, 445 U.S. 23 (1980), that imposing legal restrictions on illegitimate children which are not equally applicable to legitimate children raises serious equal protection problems and is open to constitutional question.

The classification created by the statute in question is unconstitutional because it is based on illegitimacy and does not bear an evident and substantial relationship to the particular interests the statute is designed to serve. The denial of equal protection by Tennessee Code Annotated § 36-224(2) manifests itself in three ways.

First, the statute prevents an illegitimate child over two years of age from being able to obtain child support from his natural father. This right is available to legitimate children in Tennessee. The failure of the state to provide equal access to support on behalf of both legitimate and illegitimate children violates this court's holding in Gomez v. Perez, 409 U.S. 535 (1973).

The second violation is the fact that the two year statute of limitations on paternity actions is the only statute of limitations applicable to civil actions on behalf of children which is not tolled during the minority of the child. The failure to provide an illegitimate child with a meaningful opportunity to have his paternity judicially established

violates this court's rule:

> "that absent a counter-veiling state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Bodie v. Connecticutt, 401 U.S. 371, 377 (1971).

The third violation is the fact that the two year statute of limitations is applicable only to illegitimate children who are not recipients of state aid. Children who are, or who are about to become, dependent on the state for aid may have their paternity established by any person up to their 18th birthday. Thus, illegitimate children who are dependent solely on their mother for support lose their right to legitimacy at the time they pass their second birthday. Illegitimate children who are dependent upon the state for welfare assistance, however, may be legitimated at any time prior to their 18th birthday.

The Tennessee Supreme Court, in upholding Tennessee Code Annotated § 36-224(2) as constitutional, has stated that the prevention of stale and fraudulent claims is in the state's interest. As was noted by the Supreme Court of North Carolina in County of Lenoir ex. rel. Cogdell v. Johnson, 264 S.E. 2d 816, 821:

> "• • • a child is entitled to support from its father throughout its minority. Therefore, a child's claim for such support at any time during its minority can never be said to be stale. Nor is [the statute] substantially related to the State's interest in preventing the litigation of fraudulent claims. We have no reason to believe that the mere passage of time bears a direct relation to the truth of the claim asserted. Moreover, the need of the child to receive adequate support manifestly outweighs the relation the statute of limitations may have to the prevention of fraudulent claims • • •."

This court has several times held that the blanket and conclusive exclusion of a certain class of illegitimates was not reasonably related to the prevention of spurious claims or prevention of fraud; Jimenez v. Weinberger, 417 U.S. 628 (1974), United States v. Clark, 445 U.S. 23 (1980).

Numerous times this court has struck down statutes which discriminate against illegitimates declaring that the statutes violate the equal protection clause. In Levy v. Louisiana , 391 U.S. 68 (1968) and Glona v. American Guaranty and Liability Ins. Co., 391 U.S. 73 (1968), the court dealt with wrongful death statutes regarding illegitimates and their mothers. In Webber v. Aetna Casualty and Surety Company, 406 U.S. 164 (1972), discriminatory workers' compensation statutes were dealt with. Gomez v. Perez, 409 U.S. 535 (1973) declared that illegitimates had an equal right to child support and other benefits accorded children generally. Jiminez v. Weinberger, 417 U.S. 628 (1974) held that blanket social security act exclusions of illegitimates was not reasonably related to the prevention of spurious claims. Trimble v. Gordon, 430 U.S. 762 (1977) held that intestate succession laws which treated legitimate and illegitimate children differently violated the equal protection clause. Mills v. Habluetzel, 102 S. Ct. 1549 (1982) declared unconstitutional a one year statute of limitations in Texas.

Even in the instances where this court has upheld state and federal law which had differing treatment of legitimate and illegitimates, this court has done so with the presumption that the illegitimate children could have

legally established their paternity within the lifetime of their alleged father. Mathews v. Lucas, 427 U.S. 495 (1976) upheld a social security act requirement which required a showing of dependency by illegitimates as well as proof of paternity. In Lalli v. Lalli, 439 U.S. 259 (1978), the court upheld a state statute requiring that paternity be judicially established during the lifetime of the father in order for an illegitimate child to inherit from the father by intestate succession.

This court has also held that fathers of illegitimate children also have protected interests in the custody and upbringing of their children which cannot be automatically disregarded merely because the children are illegitimate; Stanley v. Illinois, 405 U.S. 645 (1972), Caban v. Mohammed, 99 S. Ct. 1760 (1979). No time limits have been placed on the exercise of these privileges by the father of illegitimate children. However, by failing to strike down the Tennessee two year statute of limitations, this court will in effect have given these fathers rights without a corresponding duty to care for or support their children once the children have attained the age of two years without filing a paternity action or becoming a public charge.

This court has previously accorded numerous rights to illegitimate children without regard to their relationship to their natural fathers. These rights are currently meaningless to a substantial class of illegitimate children in Tennessee by virtue of the two year statute of limitations on paternity actions. The state has yet to set forth a legitimate balancing interest to justify the statute.

The appellants' claim of permanent denial of fundamental rights by a state statute is substantial. The statute discriminates by invidious classification and is not reasonably related to any state interests.

CONCLUSION

According to Pickett a non-welfare illegitimate child's right to paternal support and legitimation rests solely in the hands of its mother. If she fails to act within two years the child's right to support and legitimation is forever barred. The child has no independent right to legitimation (appendix: page 24, lines 1-5; page 25, lines 9-15).

An illegitimate child receiving welfare may have its paternity established by any person prior to reaching eighteen. Thus, illegitimate non-welfare children and illegitimate welfare children are treated differently. This differing treatment is discriminatory and unconstitutional.

The mother of a legitimate child cannot give away, relinquish, or lose her child's right to paternal support. That right may be asserted by and for the child any time prior to reaching eighteen. Thus, legitimate and illegitimate children are treated differently. This differing treatment is discriminatory and unconstitutional.

The sole rational offered for this statutory discrimination is that the state is trying to eliminate or prevent the litigation of stale and fradulent claims of paternity. This defense of the statute lacks merit.

If illegitimate welfare children are given eighteen years within which time to file a paternity suit and seek paternal support then there must to a compelling state interest served by not allowing other illegitimate children the same right. Pickett finds that the state has a compelling interest in preventing stale and fradulent claims and that the longer period is justified in welfare cases to protect the public purse (appendix: page 24, lines 8-12).

The opposite result, however, is fostered by this statutory scheme. Mothers of non-welfare children over two years of age are encouraged, if not forced, to seek welfare assistance if they wish to legitimate their child.

A woman receiving welfare is required to name the absent father of her child. This places the welfare recipient under great pressure and emotional strain. The desire and need for assistance versus her interest in protecting her lover from state prosecution. It will be the welfare case and not the non-welfare case that harbors the dangers of fradulent claims. Yet the period of limitations for these claims is eighteen years.

For these reasons, this court should note probable jurisdiction of this appeal.

Respectfully submitted,
Horne & Peppel, P.C.

Harold W. Horne

Harold W. Horne
474 S. Perkins Extended
Suite 205
Memphis, Tennessee 38117
(901) 761-3140

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FRANCES ANNETTE PICKETT

v.

BRAXTON BROWN, Appellee

and

WILLIAM M. LEECH, JR., Intervenor-Appellee

AFFIDAVIT OF FRANCES ANNETTE PICKETT
CONCERNING PROPERTY AND WEALTH OF JEFFREY LEE PICKETT

I, Frances Annette Pickett, being first duly sworn according to law, depose and say, in support of my son's motion for leave to proceed without being required to prepay costs or fees:

1. I am the petitioner in the above-entitled case, and am the mother and legal guardian of Jeffrey Lee Pickett.

2. Because of his poverty, Jeffrey Lee Pickett is unable to pay the costs of this cause.

3. Jeffrey Lee Pickett is unable to give security for the costs of this cause.

4. I believe that he is entitled to the redress he and I seek in this case.

5. Jeffrey Lee Pickett is unemployed, and does not own any property, real or personal. He has nor is entitled to any income from any source and is dependent solely upon me for his support.

State of Tennessee
County of Shelby

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Frances A. Pickett
Frances Annette Pickett

SUBSCRIBED AND SWORN TO before me this 6th day of September, 1982.

Harold Warner Hasse
NOTARY

my commission expires:
February 2, 1985.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

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v.

BRAXTON BROWN, Appellee

and

WILLIAM M. LEECH, JR., Intervenor-Appellee

AFFIDAVIT OF FRANCES ANNETTE PICKETT

I, Frances Annette Pickett, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to pre-pay costs or fees:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty, I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

I filed a petition in Shelby County, Tennessee, to establish the paternity of my son. Under Tennessee law, a child receiving welfare may have his paternity established any time prior to his 18th birthday, but a child born out of lawful wedlock who is not dependent upon the state for support can establish his paternity only if an action is filed

by his second birthday. The trial court held the statutory scheme unconstitutional and was reversed by the Supreme Court of the state of Tennessee.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

ANSWER: I am employed by the Memphis Defense Depot, 2163 Airways Blvd., Memphis, Tennessee 38114. I am paid $8.20 per hour gross; roughly $1,312.00 gross per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self- employmenmt, or in the form of rent payments, interest, dividends, or other source?

ANSWER: No.

3. To you own any cash or checking or savings account?

   a. If the answer is yes, state the total vlaue of the items owned.

ANSWER: I have a checking account with a balance of roughly $20.00 and no other cash, checking or savings accounts.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (exluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

ANSWER:

A. One acre of land at 2075 King Road, Southhaven, Mississippi 38671 worth roughly $7,000.

B. Five acres of undeveloped land in Panola County, Mississippi worth roughly $5000.

C. One 15 year old mobile home in which my son and I live, worth roughly $1,500.

D. One 1979 Dodge worth roughly $2000.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer:

My son, Jeffrey Pickett.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

State of Tennessee
County of Shelby

Frances A. Pickett
Frances Annette Pickett

SUBSCRIBED AND SWORN TO before me this 6th day of September, 1982.

Harold Warren Horne
NOTARY

my commission expires February 2, 1985.

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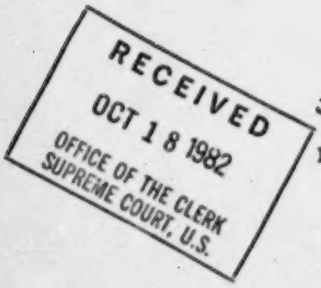
NO. 82-5576



JEFFREY LEE PICKETT, by next friend,
FRANCES ANNETTE PICKETT, and
FRANCES ANNETTE PICKETT, Petitioners

v.

BRAXTON BROWN, Appellee

and

WILLIAM M. LEECH, JR., Intervenor-Appellee

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioners, Frances Annette Pickett and Jeffrey Lee Pickett, ask leave to file the attached jurisdictional statement with the United States Supreme Court without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

Affidavits in support of this motion are attached hereto.

Leave was not sought to proceed in forma pauperis in the courts below as no costs are required or taxed by the Juvenile Court of Memphis and Shelby County, Tennessee when the petition concerns child support or the paternity of a child.

Counsel was appointed for petitioners by the juvenile court below.

Respectfully submitted,
Horne & Peppel, P.C.

Harold W. Horne
counsel for petitioners
474 S. Perkins Extended
Suite 205
Memphis, Tennessee 38117
(901) 761-3140

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing motion and attached affidavits have been mailed by U.S. Mail, first class postage prepaid, to counsel for all parties concerned: Mr. William M. Leech, Jr., Attorney General for the State of Tennessee at 450 James Robertson Parkway, Nashville, Tennessee 37219; Ms. Susan Short-Kelly, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219; and Mr. James R. McGarrh, Jr., counsel for Braxton Brown, at Suite 1930, 100 North Main Building, Memphis, Tennessee 38103, this the 14th day of October, 1982.

Harold W. Horne
counsel for petitioners
474 S. Perkins Extd. Suite 205
Memphis, Tennessee 38117
(901) 761-3140

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and

WILLIAM M. LEECH, JR., Intervenor-Appellee

AFFIDAVIT OF HAROLD W. HORNE - COUNSEL FOR PETITIONER

I, Harold W. Horne, being first duly sworn according to law, depose and say:

1. That attached hereto is a copy of a letter I received from the Juvenile Court of Memphis and Shelby County, Tennessee appointing me to represent petitioners in this cause.

2. By contract with Shelby County, I am appointed to represent petitioners in paternity cases who are found by the court to be unable to afford private counsel. Such a determination was made by the court in this case. By practice the appointment of counsel is announced in open court by the judge; but, the official notification is made by administrative letter rather than court order.

Harold W. Horne

State of Tennessee
County of Shelby

Harold W. Horne
Harold W. Horne

SUBSCRIBED AND SWORN TO before me this 12th day of October, 1982.

NOTARY

my commission expires
November 29, 1983

Juvenile Court of Memphis and Shelby County
CHILD SUPPORT BUREAU
P. O. BOX 310 • MEMPHIS, TENNESSEE 38101

Date 10/27/78

On or about this date Attorney Edith Harland requested that his/her name be removed from the court appointed counsel list and that their previously assigned cases be reassigned. Attorney Hal Horne agreed to take the case of Frances A. Pickett v Brian Brown, to notify opposing counsel of the change and to enter the appropriate order of substitution of counsel, if necessary.

Olen E. Bostick, Jr.
Director, Child Support Bureau

Juvenile Court of Memphis and Shelby County

CHILD SUPPORT BUREAU

P. O. BOX 310 • MEMPHIS, TENNESSEE 38101

June 1[illegible], 1[illegible]75

[illegible]dith Garland
2[illegible]0 Poplar
Suite 3[illegible]
[illegible]mphis, T[illegible]. 3[illegible]12

Frances Annette Pickett

V.

[illegible]ranton [illegible]ohn

Juvenile Court Docket No. 31[illegible]70

Juvenile Court Social File No. [illegible]7[illegible]7

Dear [illegible],

The Judge of the Juvenile Court of Memphis and Shelby County, Tennessee, has appointed you to represent Frances Annette Pickett, who resides at [illegible]19 [illegible]ad[illegible] [illegible]ve, Southaven [illegible]s. 3[illegible]71, telephone number _____.

This case has been transferred to the Circuit Court of Shelby County for a jury trial pursuant to Section 36-227 of the Tennessee Code Annotated.

Copies of all legal records in this case are enclosed.

Yours truly,

Vicki Curtis

Vicki Curtin

Counselor
Child Support Bureau

APPROVED:

[illegible]

Director
Child Support Bureau

[illegible]

JC-201

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-5576

JEFFREY LEE PICKETT, by next friend,
FRANCES ANNETTE PICKETT, and
FRANCES ANNETTE PICKETT, Petitioners

v.

BRAXTON BROWN, Appellee

and

WILLIAM M. LEECH, JR., Intervenor-Appellee

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IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

FILED
AUG 30 1982
JEWEL REDDEN, CLERK
SHELBY JUVENILE

FRANCES ANNETTE PICKETT, :
Plaintiff-Appellee :
:
VS. :
:
BRAXTON BROWN, :
Defendant-Appellant :
WILLIAM H. LEECH, JR., :
Intervenor-Appellant :

REVERSED AND DISMISSED

JUDGMENT

This cause coming on to be heard upon a transcript of the record from the Juvenile Court of Shelby County, briefs and argument of counsel; upon consideration whereof this Court is of opinion that in the judgment of the trial court there is reversible error.

IT IS, THEREFORE, ORDERED AND ADJUDGED by this Court that the rulings of the trial court are reversed and this action is dismissed.

This cause is remanded to the Juvenile Court of Shelby County for the collection of the costs accrued below.

Costs of this appeal are taxed against the plaintiff-appellee, Frances Annette Pickett, for which execution may issue, if necessary.

8/30/82.

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

For Publication

August 30, 1982.

FRANCES ANNETTE PICKETT,

Plaintiff-Appellee

VS.

BRAXTON BROWN,

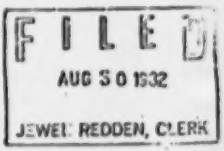
Defendant-Appellant

WILLIAM M. LEECH, JR.,

Intervenor-Appellant

SHELBY JUVENILE

Hon. Kenneth A. Turner, Judge



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OPINION

REVERSED and DISMISSED.

DROWOTA, J.

This appeal seeks to uphold the constitutionality of the two-year statute of limitations upon an action to establish paternity, found in TCA § 36-224(2).[1] The action was brought in May, 1978, to establish the paternity and obtain an order for support of a child born in November, 1968. The defendant argued that since the action was brought more than two years after the child's birth, and he had never acknowledged the child in writing or by furnishing support, the action was barred. The plaintiff mother filed a motion challenging the constitutionality of the section. She sought to amend her petition so as to bring it in the name of the child.

Plaintiff's grounds for urging unconstitutionality were: (1) that the two-year period denied her and her son equal protection of the law under the federal and state constitutions; (2) that it amounted to cruel and unusual punishment (not seriously pressed by plaintiff); and (3) that it deprived the child of due process of law in cutting off his rights before he was old enough to exercise them. Her argument was basically that children born out of wedlock were denied substantial benefits accorded to other children, since children born in wedlock may sue their fathers for support throughout their minority.

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1. The statute reads:

> Proceedings to establish the paternity of the child and to compel the father to furnish support and education for the child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the lapse of more than two (2) years from the birth of the child, unless paternity has been acknowledged by the father in writing or by the furnishing of support. Provided, however, that the department of human services or any person shall be empowered to bring a suit in behalf of any child under the age of eighteen (18) who is, or is liable to become a public charge.

The Attorney General was allowed to intervene, since constitutionality was in issue. He argued that plaintiff had no standing to challenge the constitutionality of the exception for public charges, but that in any event, such exception was constitutional as an extension of the sovereignty of the state and because there was a rational basis for making this exception. Further, the general two-year period was constitutional because it was not a limitation upon illegitimates' right to support, which was equal to that of legitimate children. Rather, the limitation was upon establishing paternity, and was justified by the state's interest in preventing litigation of stale or spurious claims. The defendant separately argued that the statut merely limited "the time in which a mother who is able to support her child may seek reimbursement from the alleged father," and the time in which the State may seek reimbursement.

The juvenile court allowed the child to be added as a plaintiff, and held the two-year portion of the statute unconsti tutional. The effect is to allow an action to be brought throug out the child's minority. The court reasoned that an illegitima child has a right, continuing throughout minority, to support fr his father. The right is enforced by an action brought under TC § 36-222. However, such an action must, in general, be brought within two years of the child's birth, while no such limitation is imposed upon a child born in wedlock. The result is that the Legislature has treated illegitimate children differently than legitimate children. Additionally, an illegitimate child's rig to support may be cut off by his mother's failure to act, with fault on the part of the child.

The trial court also ruled that the two-year period put two state interests - the welfare of its children and preventing stale claims - in conflict. The court held that the stale claim reasoning failed because the state or any person may sue during eighteen years, when the child becomes a public charge. The court also found discrimination between children born out of wedlock, some of whom are public charges and some of whom are supported privately; even if the mother did support the child, this did not terminate the father's equal obligation to support.

The court allowed an interlocutory appeal by certifying that the constitutionality of TCA § 36-224(2) was the sole determinative question of law in the proceedings. TRAP 9, TCA § 16-40[illegible]

In ruling on the equal protection challenge to the statute we begin our discussion with Mills v. Habluetzel, 50 U.S.L.W. 4372 (April 5, 1982).[2] This case held unconstitutional a Texas statute § 13.01 of Chapter 13, Title 2 of the Texas Family Code:

> A suit to establish the parent-child relationship between a child who is not the legitimate child of a

2. Because of the clarity and relevance of the Mills opinion we do not find it necessary separately to review and comment upon the line of cases decided by the Court in recent years, dealing with classifications based upon illegitimacy. See Lalli v. Lalli, 439 U.S. 259, 99 S. Ct. 518, 58 L. Ed. 2d 503 (1978); Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977); Mathews v. Lucas, 427 U.S. 495, 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976); Jimenez v. Weinberger, 417 U.S. 628, 94 S. Ct. 2496, 41 L. Ed. 2d 363 (1974); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619, 93 S. Ct. 1700, 36 L. Ed. 2d 543 (1973); Gomez v. Perez, 409 U.S. 535, 93 S. Ct. 872, 35 L. Ed. 2d 56 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 92 S. Ct. 1400, 31 L. Ed. 2d 768 (1972); Labine v. Vincent, 401 U.S. 532, 91 S. Ct. 1017, 28 L. Ed. 2d 288 (1971); Levy v. Louisiana, 391 U.S. 68, 88 S. Ct. 1509, 20 L. Ed. 2d 436 (1968); Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73, 88 S. Ct. 1515, 20 L. Ed. 2d 441 (1968).

man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.

This statute was challenged on equal protection and due process grounds. Upholding the equal protection challenge, the Court did not discuss the due process issue.

The Texas Family Code, governing determinations of paternity and entitling illegitimate children to seek such a determination and establish a paternal duty of support, was Texas' response to the Court's earlier opinion in Gomez v. Perez, 409 U.S. 535, 93 S. Ct. 872, 35 L. Ed. 56 (1973). Before Gomez, illegitimates in Texas had had no judicially enforceable right to support from the natural father. As the Court stated in Gomez

> . . . a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.

Id. at 538, 35 L. Ed. 2d at 60.

Thus, in Mills, the Court had to determine whether it was constitutional for Texas to grant a right to legitimation and support, but then place a one-year statute of limitations upon the bringing of the action. The Court held that this scheme was unconstitutional. "It would hardly satisfy the demands of equal protection and the holding of Gomez to remove an 'impenetrable barrier' to support, only to replace it with an opportunity so truncated that few could utilize it effectively." 50 U.S.L.W. at 4373. Although Texas law permitted the paternity action to b

brought by any person with an interest in the child, the mother would usually be the person who would sue. For her, there would be such obstacles to bringing a suit within a year that she would effectively be denied the opportunity to sue. The hindrances listed by the Court included financial difficulties, continuing affection for the father, shame and embarrassment, and confusion. Since any suit had to be brought within a year, such time was not long enough for the state, once a claim should be assigned to it, to take steps to sue.

The Court also held that one year was "not substantially related to the State's interest in avoiding the prosecution of stale or fraudulent claims." Id. at 4374. Problems of proof do not "justify a period of limitation which so restricts those rights as effectively to extinguish them." Id.

Considering this holding, we look at other language in the Court's opinion which would cast light upon a two-year limitation:

> The fact that Texas must provide illegitimate children with a bona fide opportunity to obtain paternal support does not mean, however, that it must adopt procedures for illegitimate children that are coterminous with those accorded legitimate children. Paternal support suits on behalf of illegitimate children contain an element that such suits for legitimate children do not contain: proof of paternity. Such proof is often sketchy and strongly contested, frequently turning upon conflicting testimony from only two witnesses. Indeed, the problems of proving paternity have been recognized repeatedly by this Court. Parham v. Hughes, 441 U.S. 347, 357, 361 (1979); Lalli v. Lalli, 439 U.S. 259, 269 (1978); Trimble v. Gordon, 430 U.S. 762, 772 (1977); Gomez v. Perez, [409 U.S.] at 538.
>
> Therefore, in support suits by illegitimate children more than in support suits by legitimate children, the State has an interest in preventing

> the prosecution of stale or fraudulent claims, and may impose greater restrictions on the former than it imposes on the latter. Such restrictions will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest. See Lalli v. Lalli, supra, at 265; Trimble v. Gordon, supra, at 767, Mathews v. Lucas, 427 U.S. 495, 510 (1976). The State's interest in avoiding the litigation of stale or fraudulent claims will justify those periods of limitation that are sufficiently long to present a real threat of loss or diminution of evidence, or an increased vulnerability to fraudulent claims.
>
> The equal protection analysis . . ., therefore, focuses on two related requirements. First, the period for obtaining support . . . to illegitimate children must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims.

Id. at 4373-4374 (emphasis added).

During the pendency of the Mills case, the Texas Legislature increased the limitation period from one to four years. Thus, five Justices joined in a separate opinion to specify that by disapproving of a one-year statute, the Court did not wish to imply approval of a period longer than one year. We take this to mean simply that the Court does not wish to prejudge any other period or any other statute, but would conside each one on its own merits and on how well it meets the proble discussed by the Court in Mills. The separate opinion notes t Court's listing of circumstances surrounding the birth of an illegitimate child, which made a one-year period unconstitutional. However, other circumstances could continue for a longer period after birth.

One circumstance was the State's interest, in additio to preventing stale and fraudulent claims, in insuring that

genuine claims are satisfied. This strong interest in doing justice and reducing the number of people on the welfare rolls, is "peculiar to the State itself." Id. at 4375.

A second point favoring a longer period was the fact that a paternity suit was one of the few causes of action under Texas law where the limitation period was not tolled during the minority of the plaintiff. "Of all the difficult proof problems that may arise in civil actions generally, paternity, an issue unique to illegitimate children, is singled out for special treatment." Id.

A third factor which could exist past the first year of life was the relationship among the parties: a continuing relationship between the parents, financial support from the father, or perhaps the child's living with the father or his relatives.

In examining the constitutionality of a two-year, as opposed to a one-year, statute, it would also be instructive to review various state court decisions, even though these precede the Mills decision.

1. The period held constitutional in In re People in the Interest of L.B., 179 Colo. 11, 498 P.2d 1157 (1972), appeal dism. sub nom. Colorado in the Interest of L.B. v. L.V.B., 410 U.S. 976, 93 S.Ct. 1497, 36 L.Ed. 2d 173 (1973), was five years from the child's birth, unless the father had acknowledged paternity in writing or by furnishing support. The Colorado Supreme Court distinguished the duty of support, owed equally

to legitimate and illegitimate children, from the threshold establishment of the paternal relationship, a duty borne by illegitimates only. The burden of proving this relationship and thus the obligation to support is greater where paternity is denied by the putative father. The difference in the two situations and the uncertainty of relationship attendant on illegitimacy is sufficient to justify treatment as two different classes for constitutional purposes." 498 P.2d at 1161.

The court held, with citations, that legislatures may enact statutes of limitations which "put infants and adults on the same footing, . . . and this is the effect of a statute containing no savings clause exempting infants." Id.

2. A landmark state case on this subject is Cessna v. Montgomery, 63 Ill. 2d 71, 344 N.E.2d 447 (1976). The Illinois Code provided that once paternity was established, legitimate and illegitimate children had an equal right to support. An action to determine paternity had to be brought within two years after the child's birth, except that where the father had acknowledged the child under oath or provided support, the action could be brought within two years of such an act on the father's part. The putative father's absence from Illinois also tolled the running of the statute.

The mother challenged the limitation on equal protection and due process grounds. The court reviewed the United States Supreme Court cases decided prior to that time, the most relevant of which was Gomez v. Perez, supra, noting that "[t]his appeal, therefore, picks up where Gomez left off. The broad question

here is to what extent a State may limit or burden the right of an illegitimate child to bring a paternity action." 344 N.E.2d at 452. The court was aware

> [t]hat proof of paternity places a burden on illegitimate children not shared by legitimate children . . .; it is also unavoidable. (H. Krause, Illegitimacy: Law and Social Policy 82 (1971); Note, Illegitimacy and Equal Protection, 49 N.Y.U.L. Rev. 479, 511 (1974).) Illegitimate children differ fundamentally from legitimate children in that at birth they have no legal relationship to their natural father. In the language of equal protection analysis, legitimate and illegitimate children are not similarly situated classes. It is not only entirely reasonable but essential that the State require proof of the paternity of illegitimates as a condition to asserting an otherwise equal support right.

Id. at 451-452.

The reasoning employed by the Illinois court in testing the validity of the two-year limitation period is quite similar to that found in Mills v. Habluetzel. First, a state may constitutionally limit the time during which an illegitimate child may bring a paternity action. Second, the court recognized the propriety of the state's interest in preventing litigation of stale or fraudulent claims. Third, it was stated that the Legislature could establish "any limitation period it deems appropriate so long as it is not so short as to be tantamount to the impenetrable barrier proscribed in Gomez." Id. So long as a limitation period cannot be said as a matter of law to be too brief, a court has no power to substitute its judgment for that of the Legislature. "The fact that the support right potentially forfeited is an important one does not authorize this court to select a longer period. We could only remove the limitation altogether . . . ." Id.

In light of these principles, basically the same as those voiced by the Supreme Court in Mills, the court found that Illinois' two-year statute did not unconstitutionally deny equal protection. The Constitution did not "compel" the court to strike down the statute, Id. A state study had found, "even with the two-year period, that paternity actions are beset with coercion, corruption and perjury. . . . It may well be that the longer the period between birth and suit the greater the possibility of fraud. At the very least, a defendant's proof of proof are substantially increased." Id.

The due process discussion found in Cessna will be mentioned below.

3. The Iowa Supreme Court held its statute constitutional in State v. Witkowski, 256 N.W.2d 216 (Iowa 1977), which relied heavily upon the Cessna opinion. The statute, § 675.33 of the Iowa Code, read:

> Proceedings to enforce the obligation of the father shall not be brought after the lapse of more than two years from the birth of the child, unless paternity has been judicially established, or has been acknowledged by the father in writing, or by the furnishing of support.

After reviewing the United States Supreme Court cases which had been decided, the court found that the two-year statute did not amount to an insurmountable barrier such as that which had existed in Conn v. Perez, supra. It was, instead a method of proof and time limitation for proving paternity. Agreeing with the rationale found in Cessna, the court found that the Iowa statute was "'carefully tuned to alternative considerations,'" 256 N.W.2d at 224, a factor which had been found

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important in United States Supreme court cases. This statute was "carefully tuned" because it provided three exceptions to the two-year period, thus alleviating potential hardships to illegitimates who fit within such exceptions.

4. Thompson v. Thompson, 285 Md. 488, 404 A.2d 269 (1979), app. dismissed, 444 U.S. 1062, 100 S. Ct. 1002, 62 L. Ed. 2d 745 (1980), uphold Maryland's statute requiring acti to be brought within two years of the child's birth, except where the putative father had acknowledged paternity in writing or had provided support, in which case the suit could be brought within two years of the last such act by the father. Md. Code Art. 16, § 66(e) (1973). The statute was part of a revision of the law which had as one of its purposes "the promotion of the general welfare and best interests of [illegitimate] children by securing to them, as near as practical, the same right to support, care and education as legitimate children." Id., § 6 (emphasis added). The court discussed the purpose of statutes of limitations; as to the statute specifically in question, it noted:

> Memories do fade with the passage of time. Circumstances change, too. After the lapse of a number of years from contact with the mother of an illegitimate child an accused male might have substantial difficulty in establishing that he was not the only individual who could have sired the child in question. This might be because changed family circumstances could cause individuals who previously would have so testified to be unwilling to state that they had sexual intercourse with the child's mother at a time when they could have sired the child in question. . . . We find no fundamental right of the child affected by this statute.

404 A.2d at 273. Thompson also discussed the due process challenge, with which we shall deal below.

5. An interesting interpretation of legislative purpose is found in Matter of Nores v. Feel, 73 Misc. 2d 942, 343 N.Y.S. 2d 220 (Fam. Ct. N.Y. Co. 1973). Under § 517 of the New York Family Court Act, action had to be brought within two years after the child's birth, unless the father had acknowledged paternity in writing or by furnishing support. However, if the mother or child was or was likely to become a public charge, the public welfare officials could sue within ten years after the birth. In this case, the putative father challenged the constitutionality of this distinction, which affected the liability of a father based upon the mother's income level.

The court criticized Matter of Wales v. Gallan, 61 Misc. 2d 681, 306 N.Y.S.2d 614 (Fam. Ct. Richmond Co. 1969). That case had held the two-year period unconstitutional, extending the limit for any suit to ten years. That case was never reviewed by a higher court, so did not become precedent. The Nores case found that Wales had not correctly analyzed the legislative purpose and related it to the classification created by the statute. Nores held that the legislative purpose was clearly not to assure to all illegitimates an equal chance of establishing paternity, or to make all putative fathers equally liable to paternity suits. Rather, it was more likely to assure that illegitimates were supported and educated by someone (mother, father, or public welfare), and to protect society by preventing the child from becoming a public charge if one of the other sources of private support was available (citing 10 Am. Jur. 2d Bastards § 75 (1963)). The statute seemed to the Nores court a very rational means of fulfilling such an objective.

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The fact that the legislature could have subjected the state to the same two-year period did not render unconstitutional the use of two different periods.

The court also noted the serious due process problem - that of obtaining proof - created for the father by a possible ten-year lapse. However, even the distinct possibility that after ten years many men would be subjected "to what is potentially a drumhead trial," 343 N.Y.S.2d at 226, did "not compel the conclusion that the 10-year statute was unconstitutional under the Due Process Clause," Id.

The plaintiff mother in the case at bar argues, in addition to her equal protection challenge, that Tennessee's statute of limitations results in an unconstitutional denial of due process of law under the federal and state Constitutions. She states,

> The statute of limitations as drafted allows a child's right to paternal support to terminate before the child has any real opportunity to assert it. Permitting a child's mother to institute paternity proceedings in behalf of her offspring does not satisfy the requirements of due process because the mother's short term interests, i.e., continuing fondness for the father or her reluctance publicly to reveal her indiscretion, may conflict with the child's long term interests of support and legitimation.[3]

The Supreme Court in Mills, supra, did not reach the due process issue because it held that Texas' one-year statute

3. TCA § 36-224(1) allows suit to be brought by the mother or her personal representative. If the child is likely to become a public charge, suit may be brought by the state department of human services or by any person. If the mother is dead or disabled, suit may be brought by the child through a guardian or next friend.

denied equal protection. However, since it held that a state could enact a limitation period shorter than a child's minority, 50 U.S.L.W. at 4373; and because it recognized that "during the child's early years [a paternity action] will often be brought by the mother," id. at 4374, we conclude by inference that to allow the mother to sue, and to grant her a time shorter than the child's minority, would not in and of itself be any more unconstitutional on due process grounds than it would be on equal protection grounds. The inquiry, then, remains essentially the same: whether the State's policy as reflected in the statute affords a fair and reasonable opportunity for the mother to decide in a rational way whether or not the child's best interest would be served by her bringing a paternity suit.

Other courts have addressed this issue and found such a statutory scheme constitutional. We quote at length from Cessna v. Montgomery, supra:

> The question, of course, is whether authorizing only the mother to bring suit unreasonably hinders the child's opportunity to secure support from his natural father. Obviously, the action must be brought by some person on the child's behalf, for the child cannot do so himself within the limitation period. And, we note parenthetically, it is within the competence of the legislature to enact a limitation period not tolled during minority. [Citations.]
>
> Possible legislative alternatives would include authorizing an action by a next friend or guardian. Plaintiffs argue that under no circumstances should the mother be permitted to sue on behalf of the child since their interests are potentially adverse. (See H. Krause, Illegitimacy: Law and Social Policy 113, 151-52 (1971); Note, Illegitimacy and Equal Protection, 49 N.Y.U.L. Rev. 479, 530 (1974); Gray & Rudovsky, The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co., 118 U.Pa.L. Rev. 1, 25 (1969).) Her continuing fondness for the father or her reluctance to publicly reveal her indiscretion could result in

> a decision to forego an otherwise viable suit. We do not deny this possibility exists. Yet plaintiffs' argument assumes that the child's interest is always best served by prompt suit against the father. Society still regards an illegitimate birth as something of a scandal, however, and the best interests of the child in a particular case may not always lie in the direction of public action against the natural father. It seems to us that the mother is ordinarily best positioned to make this difficult decision. Moreover, once a decision has been made to file an action, the interests of mother and child substantially coincide. Support for this conclusion is to be found in Pittman v. United States (9th Cir. 1965), 341 F.2d 739, where the court held a minor's tort claim against the government could constitutionally be barred after two years although he had no guardian ad litem, and despite a claimed conflict of interest that may have caused the father to subordinate his son's interest. The court specifically rejected plaintiff's contention that his right was meaningless because he could not act for himself during his minority.
>
> In our judgment the General Assembly could reasonably conclude that the support right of an illegitimate child is best protected by requiring the action to be brought by the mother, and that the potential harm to putative fathers defending stale claims is, on balance, greater than the potential harm to illegitimate children whose support right is forfeited by the mother's inaction.

344 N.E.2d at 453. The highest court of Maryland agreed with this reasoning in a discussion found in Thompson v. Thompson, supra, 404 A.2d at 273.

In Reynolds v. Richardson, 483 S.W.2d 747 (Tenn. App. 1971), cert. denied, 410 U.S. 944, 93 S. Ct. 1381, 35 L. Ed. 2d 611 (1973), the Court of Appeals held that when the mother and grandparents of an illegitimate child accepted $500 from the parents of the putative father in exchange for their agreement not to bring any action against him, this did not release the child's cause of action to establish paternity and for support. The mother had brought an earlier paternity suit which she dismissed upon being paid the $500. The Court of Appeals stated,

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> "This statutory duty [of support] inures to the benefit of the child and we do not conceive that the dismissal by the mother of the original warrant could be considered as foreclosing the right to later assert the father's duty to furnish necessary support."
>
> There is a distinction to be made between the release or waiver of the claims of the mother, which can validly be accomplished, and a release of the rights of the infant child which, ordinarily, should not be permitted. . . .
>
> . . .
>
> Accordingly, to the extent that this proceeding is brought by or for the benefit of the mother or maternal grandparents, it will be dismissed.
>
> To the extent that this proceeding is brought by or for the benefit of the infant child, we hold that it is not affected by the above quoted release.

483 S.W.2d at 751-752.

. .

The mother had filed and dismissed the original action v shortly after the child's birth. Thus, it can be distinguished from the case at bar in that the mother could not be said to have had a reasonable time during which to reflect upon and assess what course of action would be in the child's best interests. As a matter of policy, the mother as the party responsible for the child should have the entire two-year limitation period during which to consider a choice which will bind the child. To the extent to which the Reynolds opinion appears to hold that no action or decision made by the mother can be allowed to bind the child, it is overruled.

Several state courts have reached a contrary result and hold their limitation periods unconstitutional. As mentioned above, Matter of Walen v. Callan, supra, did so, but has not been looked upon as precedential. Two years was held

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too short a time during which to allow suit: Mothers might still have, or hope to resume a relationship with the father, or be anticipating voluntary acknowledgment or support from him. In addition to the child's economic interest in establishing paternity, he has a "psychological" interest in knowing who his father is. Turning to the state's countervailing interests in maintaining the limitation, the two-year period was for the purpose of protecting the putative father from stale claims. This was not rational, because some fathers were subject to a ten-year period. Secondly, the purpose of the ten-year period was to protect the public purse, but the effect of this was to subordinate what should have been the State's primary purpose - protecting the well-being of children. The court's solution was to lengthen the limitation period to ten years for any suit. Thus, the court did not hold that illegitimate children had to be treated the same as legitimate children.

The Montana Supreme Court struck down a three-year limitation but retained it as to actions brought by the State. Montana v. Wilson, 50 U.S.L.W. 2132 (August 8, 1981).

In Stringer v. Dudoich, 92 N.M. 98, 583 P.2d 462 (1978), the New Mexico Supreme Court held unconstitutional a statute which placed a two-year limitation upon actions for support, except where paternity had been judicially established, or had been acknowledged in writing or by the furnishing of support. There was no limitation upon actions brought by the State.

The court reasoned that illegitimates had the same right to support as did legitimates. Since there was no time limitat

upon the right of a legitimate child to bring an action, Gomez v. Perez mandated that the same right be extended to illegitimates.

The Florida Supreme Court treated the subject in depth in State v. West, 378 So. 2d 1220 (Fla. 1979). Section 95.11 (3)(b), Fla. Statutes (1975) required an action to determine paternity to be brought within four years, but under § 95.[illegible] (1)(e), the running of the time was tolled when the putative father made voluntary payments toward support.

The court pointed out that an illegitimate child had a right to support from his father, which right continued until the age of eighteen; and that placing a time limitation upon the enforcement of such resulted in

> the [legislature's] treating legitimate children differently from illegitimate children. Because of this statute, the rights of the illegitimate child to support may be foreclosed forever by failure of his mother to file suit through her ignorance, neglect, or sympathy with the father and through no fault of the child.

378 So. 2d at 1222. The court reviewed the then existing Supreme Court opinions to determine that the "substantial relationship" test should be applied in considering whether or not the differing treatment was constitutional.[4]

4. This conclusion seems correct. It is clear that the "strict scrutiny" test has been rejected by the Court, Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977); Mathews v. Lucas, 427 U.S. 495, 96 S.Ct. 2755, 49 L. Ed. 2d 651 (1976). Mills v. Habluetzel, supra, referred to the limitation as not being "substantially related" to the valid state interest in avoiding litigation of stale or fraudulent claims. When one reads the Supreme Court's numerous opinions concerning classifications based upon legitimacy, one discerns that the Court's objective has been to determine whether there is a rational relationship between the classification and the state interest. However, the relationship must be actual, logical and apparent to the reasonable person. As the Court has put it, "the scrutiny by which their showing is to be judged is not a toothless one, e.g., Jimenez v. Weinberger, 417 U.S. 628, 41 L. Ed. 2d 363, 94 S. Ct. 2496 (1974)." Mathews v. Lucas, supra, 427 U.S. at 511. "In a case like this, the Equal Protection Clause requires more than the mere incantation of a proper state purpose." Trimble v. Gordon, supra, 430 U.S. at 769.

Best Copy Available

In this situation, the court could not find a sufficient relationship between this statute and the state's interest in barring state claims, the reason being that the illegitimate's right to support was an ongoing one, continually renewing itself until the child reached eighteen. It was held that requiring suit to be brought within four years created an impenetrable barrier to the child's right, when the State could instead have specified requirements to assure that proof of paternity would be adequate. Besides, the limitation period defeated the state's own interest in children being supported by their natural parents.

In effect, the court held that any limitation period would be unconstitutional because it would result in differing treatment of legitimate and illegitimate children.

We have carefully considered Mills v. Habluetzel, supra, all of the earlier Supreme Court and state court opinions, the various policies and arguments advanced therein, and the arguments of the parties in the case at bar. We do not feel that Mills would require a holding of unconstitutionality here, even though obviously, in the wake of Mills, two years becomes the minimum period which could possibly be upheld. It is our opinion that those cases which uphold the constitutionality of limitation periods of two years or longer are the better reasoned. Cases finding unconstitutionality do not appear to recognize a distinction which we feel is important: that between the right to paternal support throughout minority (which exists equally in favor of both legitimates and illegitimates), and the right to establish the identity of the individual who bears such duty of support (wherein legitimates and illegitimates are not similarly situated classes).

In the case of an illegitimate child, the mother (or whoever might sue in her stead) must weigh the circumstances and relationships involved and determine whether it is in the best interests of the child and of herself to bring an action to identify the father, or not to bring an action and assume the entire duty of support herself. The Hills case definitively holds that the expressed state interest in having a statute of limitations upon paternity actions - preventing litigation of stale and fraudulent claims - is a valid one. It has held that one year is as a matter of law too short a time for the mother to make a decision, because of financial, emotional and, we might add, physical strains and problems which very often endure through many months after childbirth. Even though these and other circumstances might also endure beyond the first year, we cannot say as a matter of law that the Legislature could not rationally determine that such a possibility became outweighed by the state's interest in prohibiting litigation of stale and fraudulent claims. The Legislature could rationally determine that two years is long enough for most women to have recovered physically and emotionally, and to be able to assess their and their children's situations logically and realistically. It could rationally decide, on the other hand, that to allow longer than two years would unreasonably increase the putative fathers' problems of proof in most cases. Its considerations could include the temporary nature of many relationships outside wedlock; the possibility of the formation of new relationships by the mother, putative father, and anyone else with whom she might have had relations at the relevant time; the difficulty of producing proof to rebut the mother's testimony; the statistics showing the frequency of false and very subjective testimony in this

type of case; and the fact that, by the time two years have elapsed, the mother theoretically could have had another child.

Further, the Tennessee statute is "carefully tuned" to avoid hardship in predictable groups of cases, since it contains an exception for actions against men who have acknowledged their children in writing or by supporting them,[5] and it has been held that in Tennessee, regular or substantial payments are not required in order to constitute "support." Reynolds v. Richardson, 462 S.W.2d 233 (Tenn. App. 1970). We do not today consider what circumstance outside the statute, if any, could keep the statute from operating in favor of a putative father in a particular case. In any event, the statutory exceptions should satisfy the concerns of the Supreme Court in Mills, about conditions persisting beyond one year which could make difficult the bringing of a paternity suit. The state's countervailing interest in doing justice and reducing the number of people on welfare is served by allowing the state a longer time during which to sue. The Court's concern about ongoing relationships among the parties is satisfied by the acknowledgement exceptions. This leaves the Court's concern that the limitation period is unique in not being tolled during the plaintiff's minority, but we do not find that this factor alone requires a holding of unconstitutionality of a two-year period, as opposed to any other period which can end during the plaintiff's minority.

5. VCA § 46-234(2). Justice O'Connor points out in her concurring opinion that the Texas statute does not make exceptions for those "practical obstacles to filing suit within one year."

Since the mother is the party primarily authorized by the statute to bring the action, and thus of necessity makes a decision which is binding on the child, we agree with those courts which have held that, for a myriad of reasons, she is the best qualified person to do so. The state has determined that the mother should be allowed to make this important decision, as it is essentially a private matter. So long as the child is able to be supported privately, the state allows the matter to remain private. If the mother comes to a point where she requires public assistance in order to support the child, the state and its taxpayers acquire an interest which they did not previously have, which accounts for the statute's exception for actions brought by the state.[6]

There are many decisions, both important and minor, arising in many contexts, which are made by parents on behalf of their children. These may have significant and lasting effects upon the children. A woman's decision to shoulder the duty of support and cut herself and the child off from the putative father, is but one example of such a decision. No matter what the limitation period, if it is shorter than the child's minority, the mother would still be the person making or profoundly influencing this decision.

Counsel for the mother in this case raises the possibility that a mother could evade the two-year period by giving up her job, thus losing her source of funds with which privately

6. We do not today decide the constitutionality of the eighteen-year exception to the limitation period, from the point of view of a putative father who is sued by the "Department of Human Services or any other person."

to support the child; and apply for welfare, thus forcing the State to bring a paternity suit, which can be done throughout the child's minority. Even if this could happen in a few cases, we would note that there are sanctions against abuse of the welfare system, and that such possibility does not render the Legislature's determination to set a two-year period unconstitutional. A mother could resort to such an option no matter how long or short the limitation period.

The mother petitioned to amend her complaint to add the name of the child, by the mother as next friend, as a plaintiff. The court allowed such an amendment, and the defendant and state have not appealed this ruling. However, TCA § 36-224(1) does not permit an action to be brought by the child except in case of death or disability of the mother. This error is harmless, as we hold that this action was barred by the two-year statute of limitations.

We find that the statute of limitations under consideration here meets the test enunciated by the Supreme Court in Mills: It is sufficiently long to present a reasonable opportunity for those who may sue, to assert claims on behalf of illegitimate children. Second, the general two-year limitation, although exceptions are provided where other state interests prevail, is substantially related to the state's interest in avoiding the litigation of stale or fraudulent claims. See Mills, supra, 50 U.S.L.W. at 4374. Two years, as opposed to one year, is not a period which "remove[s] an 'impenetrable barrier' to support, only to replace it with an opportunity so truncated that few could utilize it effectively." Id. at 4373. Every

illegitimate child can enforce a father's support obligation if a suit to declare paternity is brought, and two years is not, as a matter of law, an unreasonably short time. As the Supreme Court has said in another recent case,

> [f]ew statutory classifications are entirely free from the criticism that they sometimes produce inequitable results. Our inquiry under the Equal Protection Clause does not focus on the abstract "fairness" of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment. . . .
>
> . . . Inheritance [in this case, enforcing the father's support obligation] is barred only where there has been a failure to secure evidence of paternity during the father's lifetime [in this case, within the period of limitations] in the manner prescribed by the State. This is not a requirement that inevitably disqualifies an unnecessarily large number of children born out of wedlock.

Lalli v. Lalli, 439 U.S. 259, 273, 99 S. Ct. 518, 58 L. Ed. 2d 503 (1978)(emphasis added).

It is not our function to substitute our opinion as to what would be the most desirable policy, for that of the Legislature. TCA § 36-224(2) meets the test of being substantially related to a legitimate state interest. Accordingly, the rulings of the trial court are reversed and this action is dismissed. Costs of this appeal shall be borne by the plaintiff-appellee.

Reversed and dismissed.

Frank F. Drowota, III, Justice.

Concur:

Harbison, C.J.
Fones, Cooper and Brock, JJ.

IN THE JUVENILE COURT OF MEMPHIS

AND SHELBY COUNTY, TENNESSEE

JEFFREY LEE PICKETT by next friend, FRANCES ANNETTE PICKETT, and FRANCES ANNETTE PICKETT, mother of JEFFREY LEE PICKETT,	*	
Plaintiff,	*	
VS.	*	NO. 31870
BRAXTON BROWN,	*	
Defendant.	*	

ORDER DECLARING A PORTION OF T.C.A. 36-224(2) UNCONSTITUTIONAL AND AMENDING PLAINTIFF'S PETITION

I

Frances Annette Pickett has filed a petition to establish paternity pursuant to Tennessee Code Annotated §36-222 et. seq. alleging that Braxton Brown is the natural father of her son, Jeffrey Lee Pickett, born November 1, 1968. This petition was filed May 24, 1978, roughly ten years after Jeffrey's birth.

Braxton Brown denied paternity and in reply alleged that he "has never, in or by any writing or other means, acknowledged or furnished any support to Jeffrey Lee

Pickett, born November 1, 1968, to Frances Annette Pickett." Based upon this answer, the Defendant moved to dismiss this paternity suit based upon the two year statute of limitations set out in Tennessee Code Annotated §36-224(2).

Plaintiff replied by filing a motion challenging the constitutionality of the two year statute of limitations as set out in Tennessee Code Annotated §36-224(2) and further moving to amend her petition to also bring the paternity suit as next friend in behalf of her child. Notice was given to the Attorney General of Tennessee who intervened to uphold the statute's constitutionality. The parties are all in agreement that if the statute of limitations is constitutional, this petition to establish paternity must be dismissed.

This Court finds that the two year statute of limitations as set out in Tennessee Code Annotated §36-224(2) violates the equal protection clause of the United States Constitution as well as Article 1, Section 8 and Article 11, Section 8 of the Tennessee Constitution and accordingly so rules.

II

A child born out of lawful wedlock has a right to support from his father. Tennessee Code Annotated §36-223, Brown v. Thomas (1968), 221 Tenn. 319, 426 S.W. 2d 496. His mother as caretaker and natural guardian merely serves as a proper person to receive the support benefits due and owing a child born out of lawful wedlock, and she can not contract away the child's right or release the putative father's obligation. Reynolds v. Richardson (App. 1971), 483 S.W. 2d 747, cert. denied, Reynolds v. Tennessee (1973), 410 U.S. 944, 35 L. Ed. 2d 611, 93 S. Ct. 1381. A right of a child born out of lawful wedlock to obtain support is a continuing right until the child reaches the age of 18 years. This right may be enforced by a paternity suit under Tennessee Code Annotated §36-222 et. seq., which is both an action to determine paternity and an action for child support. Tennessee Code Annotated §36-224(2) imposes a two year statute of limitations within which the right of a child born out of lawful wedlock to parental support must be asserted, unless the child is or is about to become a public charge, but no such limitation is imposed on the support rights of a child born in wedlock who has a court enforceable right to support in Tennessee until age 18. By enacting this

statutory limitation on the time in which paternity actions may be brought, the Legislature is treating children born out of lawful wedlock differently from children born in wedlock. Because of this statute, the rights of a child born out of wedlock to support may be foreclosed forever by the failure of his mother to file a suit through her ignorance, neglect, or collusion with the father and through no fault of the child.

The State, through the Attorney General, argues that the two year statute of limitations is essentially a rule founded upon the State's legitimate interest in preventing litigation of stale or spurious claims.

Two important State objectives are in conflict: the State's interest in the welfare of its children versus the State's interest in preventing stale claims. The child's welfare is paramount. If this child was, or was about to become, a public charge, the State or any person (pursuant to Tennessee Code Annotated §36-224(2)) could bring a paternity petition against Braxton Brown. Certainly the possibilities of fraud, perjury, or litigation of stale claims is no more inherent in a case

brought by a child who is not receiving public assistance than by a case brought for a child who is a public charge.

The Attorney General further argues that the State has a strong interest in protecting the public treasury and in assuring that at least one person will be financially responsible for a child. This interest does not exist when the child is not a public charge and is supported by its mother or some other person. When the child requires welfare payments to subsist, however, the State acquires a strong interest in identifying the father.

This argument contradicts itself and does not serve the public policy of Tennessee. Were this case to be dismissed based upon the two year statute of limitations, Frances Annette Pickett would be encouraged to quit her employment and join the welfare rolls in order to legitimate her child. In fact, this entire controversy could be circumvented by Ms. Pickett's terminating her employment and applying for welfare. Thus, were the two year statute of limitations to be constitutional, it would encourage the mothers of children born out of wedlock to seek public assistance in order to bring paternity proceedings.

III

Not only does the statute of limitations discriminate between children born in and out of wedlock, but it further discriminates between children born out of wedlock who are receiving public assistance and such children whose mothers are not receiving public assistance. Both parents are obligated to support their children. The fact that one parent is supporting a child does not terminate the other parent's obligations to contribute toward the support of the child. Under the present statute, a child who relies on the State welfare rolls for his subsistence may be legitimated at any time prior to his 18th birthday. A child who is not supported by the State, however, may be legitimated only up to his second birthday - unless his father acknowledges paternity.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That Petitioner, Frances Annette Pickett, is allowed to amend her complaint to bring this petition to establish paternity in her name and in the name of her child by her as next friend;

2. That the portion of Tennessee Code Annotated §36-224(2) which provides an action shall not be brought

after this lapse of more than two (2) years from the birth of this child, unless paternity as been acknowledged by the father in writing or by the furnishing of support is unconstitutional;

3. The Attorney General and the Defendant have prayed an interlocutory appeal from this order pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure and Tennessee Code Annotated §16-408. It is hereby certified that the constitutionality of the statute of limitations as set forth in Tennessee Code Annotated §36-224(2) is the sole determining question of law in the present proceedings, and that there is substantial ground for difference of opinion as to this issue. An immediate appeal from the present order may materially advance the ultimate determination of the litigation and result in a net reduction in the duration and expense of this litigation if the present order is reversed, since the existence of the statute of limitations will affect the entire conduct of the trial proceedings and the nature of the evidence on which the Court must base its decision. Furthermore, the practice in other courts is now inconsistent with the present order, and there is need to develop a uniform body of law in this area.

It is therefore ordered that an interlocutory appeal is hereby granted on the issue of whether the statute of limitations as set forth in Tennessee Code Annotated §36-224(2) is constitutional.

ENTERED this 24 day of April, 1980.

Judge Kenneth A. Turner

APPROVED FOR ENTRY:

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A TRUE COPY ATTEST
WILLIAM O. FULMER, CLERK
Michael Pugh D.C.
4-25-80

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

TENNESSEE DEPARTMENT OF HUMAN SERVICES, ASSIGNEE OF DELORES ANNE KING,	:	
Plaintiff-Appellant	:	SHELBY JUVENILE
VS.	:	
	:	JUVENILE COURT AFFIRMED AND REMANDED
LUTHER LEON LUMLEY,	:	
Defendant-Appellee	:	

FILED
AUG 30 1982
JEWEL REDDEN, CLERK

JUDGMENT

This cause coming on to be heard upon the record from the Court of Appeals, Western Section at Jackson, application for permission to appeal having been heretofore granted, briefs and arguments of counsel; upon consideration whereof, this Court is of opinion that the Court of Appeals erred in dismissing the appeal, the action of the Juvenile Court is affirmed, and the cause is remanded for further proceedings.

In accordance with the opinion of the Court filed herein, it is, therefore, ordered and adjudged by this Court that the cause be remanded to the Juvenile Court of Shelby County for further proceedings not inconsistent with the Court's opinion, a certified copy of which will accompany the mandate on the remand, and for the collection of the costs of the court below; for all of which let mandate issue.

Costs of the appeal are taxed to the defendant, Luther Leon Lumley, for which let execution issue, if necessary.

8/30/82.

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

For Publication

August 30, 1982.

TENNESSEE DEPARTMENT OF HUMAN SERVICES, ASSIGNEE of DELORES ANNE KING,

Plaintiff-Appellant

VS.

LUTHER LEON LUMLEY,

Defendant-Appellee

FILED

AUG 30 1982

JEWEL REDDEN, CLERK

SHELBY JUVENILE
Hon. Kenneth A. Turner, Judge.

For Plaintiff-Appellant:

Harold W. Horne
Memphis, Tennessee

Michael E. Terry
Deputy Attorney General
Nashville, Tennessee

For Defendant-Appellee:

Wilburt J. Chiapella
Memphis, Tennessee

OPINION

JUVENILE COURT AFFIRMED and REMANDED.

DROWOTA, J.

This case is before this Court on a procedural issue: whether a decision by a juvenile court on a question of law in a paternity suit (TCA § 36-222 et seq.) should be appealed to circuit court or to the Court of Appeals.

The child in question was born May 6, 1972. The Department of Human Services as assignee of the mother, a welfare recipient, brought action against the defendant herein on August 11, 1977. The action was transferred to circuit court and a jury trial was actually held, in which defendant was found to be the father and liable for support of the child. However, the defendant had received no notice of the trial and successfully petitioned to have the jury verdict vacated on June 7, 1979. Subsequently, defendant filed a motion in juvenile court for dismissal of the action, pleading, inter alia, that the action was barred by the statute of limitations, TCA § 36-224(2). Consequently, on February 4, 1980, the circuit court, by consent of the parties, remanded the entire cause to juvenile court. The parties stipulated that defendant denied paternity and had not acknowledged the child in writing or by furnishing support.

On November 26, 1980, the juvenile court entered an order denying the defendant's motion to dismiss, finding that the general two-year statute of limitations did not apply to the Department of Human Services: That a petition may be brought by the Department prior to the child's eighteenth birthday. The court granted defendant permission to seek an interlocutory appeal in the Court of Appeals. That court granted permission to bring such an appeal under TRAP 9. On May 1, 1981, the plaintiff filed a motion in the Court of Appeals, requesting

that the circuit court clerk be ordered to send up the record of the proceedings which had taken place in circuit court. It was alleged that that record was needed, in addition to the record from juvenile court, in order to formulate an appropriate response to the defendant's brief and to explain the issues on appeal. The motion asserted the need to incorporate portions of the circuit court record. The only issue which had been certified to the Court of Appeals was:

> Does the statute of limitations set forth in Tennessee Code Annotated, Section 36-224(2) bar the Tennessee Department of Human Services, Assignee, from proceeding in this paternity case instituted more than two (2) years from the birth of the child where the defendant has not acknowledged paternity in writing or by the furnishing of support?

Thus, the sole issue was one of statutory interpretation. Neither questions of evidence nor of constitutionality were raised.

Meanwhile, on April 7, 1981, this Court entered an order pertaining to another case, which caused confusion in the case at bar. The April 7 order was vacated on June 22, 1981, but on June 8 the Court of Appeals denied plaintiff's motion to transfer the record from circuit court and, on its own motion, dismissed the TRAP 9 appeal.

The confusion caused by the order of April 7, 1981, was between TCA § 37-258(a), which makes the blanket provision that "any appeal from any final disposition of a child, except a disposition pursuant to § 37-234, may be made to the circuit court which shall hear the testimony of witnesses and shall try the case de novo"; and § 36-235, which provides:

> An appeal from any final order or judgment of any court having jurisdiction of the proceedings as provided for in this chapter may be perfected to the court of appeals within thirty (30) days after the entry of said order or judgment, and the same shall be reviewable de novo as are other equity appeals.

The appeal in this case was not from a "final disposition of a child," § 37-258(a), but from a question of law decided by a court "having jurisdiction of the proceedings as provided for in this chapter [Title 36, Chapter 2, Bastardy]," § 36-235. Therefore, the Court of Appeals was correct in granting permission to appeal under TRAP 9 in the first instance; and it was in error in dismissing the appeal after having granted the permission.

Normally, we would remand the cause to the Court of Appeals for consideration of the underlying issue certified to it by the juvenile court. However, in this case, the same issue was ruled upon by this Court in the case of Frances Annette Pickett v. Braxton Brown, ___ S.W.2d ___ (Tenn. 1982), released simultaneously this date. That is to say, Pickett holds that TCA § 36-224(2) creates an exception to the general two-year limitation period in paternity actions; and that in any case where the child is or is likely to become a public charge, suit may be filed by the Department of Human Services throughout the eighteen years after the birth of the child. To us, this is the plain meaning of the statute; it cannot be construed to mean, as defendant Lumley contends, that the Department is bound by the two-year period if the putative father has not acknowledged the child in writing or by providing support.

This issue having been disposed of, it would be pointless to remand the cause to the Court of Appeals in this particular

case. Instead, we reverse the ruling of the Court of Appeals dismissing the Rule 9 appeal, and remand the cause to the juvenile court of Shelby County, from which the interlocutory appeal was taken, for further proceedings.

The costs of this appeal are taxed to the defendant Lumley.

Affirmed action of the juvenile court and remanded.

Frank F. Drowota, III, Justice.

Concur:

Harbison, C.J.
Fones, Cooper and Brock, JJ.

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

FRANCES ANNETTE PICKETT,	*	
Plaintiff-Appellee,	*	
VS.	*	
BRAXTON BROWN,	*	No. Shelby Juvenile 1
Defendant-Appellant,	*	
WILLIAM M. LEECH, JR.,	*	
Intervenor-Appellant.	*	

NOTICE OF APPEAL
TO
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the plaintiff-apppellee herein, Frances Annette Pickett, appeals to the Supreme Court of the United States the judgment entered in the above styled cause by the Supremo Court of Tennessee on August 30, 1982, upholding the constitutionality of the two (2) year statute of limitations as set forth in Tennessee Code Annotated, § 36-224 (2). This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

Harold W. Horne - Attorney
for Plaintiff-Appellee
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing notice of appeal has been mailed by U.S. Mail, first class postage prepaid, to counsel for all parties concerned: Mr. William M. Leech, Jr., Attorney General for the State of Tennessee at 450 James Robertson Parkway, Nashville, Tennessee 37219; Ms. Lee Breckenridge, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219; and Mr. James R. McGarrh, Jr., counsel for Braxton Brown, at Suite 1930, 100 North Main Building, Memphis, Tennessee 38103, this the 9th day of September, 1982.

Harold W. Horne

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SEP 13 1982

FRANCES ANNE PICKETT
vs.
BRAXTON BROWN

STATE OF TENNESSEE
SUPREME COURT
COURT OF APPEALS
COURT OF CRIMINAL APPEALS
Jewel Redden, Clerk

Shelby Juvenile No. 1

Jackson Sept. 9 19 82

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES received and filed today.

Respectfully,
JEWEL REDDEN, Clerk

Supreme Court, U.S.
FILED
JAN 10 1983
ALEXANDER L. STEVAS
CLERK

No. 82-5576

In the Supreme Court of the United States

OCTOBER TERM, 1982

JEFFREY LEE PICKETT, BY NEXT FRIEND,
FRANCES ANNETTE PICKETT, AND
FRANCES ANNETTE PICKETT, APPELLANTS,

v.

BRAXTON BROWN, APPELLEE

AND

WILLIAM M. LEECH, JR., INTERVENOR-APPELLEE

APPEAL FROM THE SUPREME COURT OF TENNESSEE

JOINT APPENDIX

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APPEAL DOCKETED OCTOBER 18, 1982
PROBABLE JURISDICTION NOTED
DECEMBER 6, 1982

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RELEVANT DOCKET ENTRIES

May 24, 1978

Petition to Establish Paternity filed in the Juvenile Court of Memphis and Shelby County, Tennessee.

June 6, 1978

Juvenile court order transferring case to circuit court for a jury trial on the issue of paternity entered.

April 30, 1979

Defendant filed in the circuit court a motion to dismiss based upon the two year statute of limitations. (This motion was not a part of the record before the Supreme Court of Tennessee.)

May 8, 1979

Circuit court transferred case back to the juvenile court for a hearing on the defendant's motion to dismiss. (This order was not included in the joint appendix but can be found at page three (3) of the technical record before the Supreme Court of Tennessee.)

July 9, 1979

Plaintiff's motion challenging the constitutionality of Tennessee's two year statute of limitations filed in the juvenile court.

April 24, 1980

Juvenile court order declaring two year statute of limitations unconstitutional entered.

June 9, 1980

Supreme Court of Tennessee enters order granting defendant's application for permission to appeal juvenile court order.

August 30, 1982

Supreme Court of Tennessee enters judgment reversing the ruling of the juvenile court.

September 9, 1982

Notice of appeal to the Supreme Court of the United States filed with the Supreme Court of Tennessee.

October 18, 1982

Appeal docketed in the Supreme Court of the United States.

December 6, 1982

Motion of appellants for leave to proceed *in forma pauperis* granted and probable jurisdiction noted by the Supreme Court of the United States.

IN THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY, TENNESSEE

DOCKET NO. 31870

FRANCIS ANNETTE PICKETT, PETITIONER

v.

BRAXTON BROWN, DEFENDANT

PETITION TO ESTABLISH PATERNITY—
Filed May 24, 1978

To the Honorable Kenneth A. Turner, Judge of the Juvenile Court of Memphis and Shelby County, Tennessee:

Your petitioner, Francis Annette Pickett, respectfully represents to the Court that the defendant is the natural father of Jeffrey Lee Pickett, born November 1, 1968 a child (ren) born out of wedlock and that Frances Annette Pickett is the mother of said child(ren).

Your petitioner further avers

PREMISES CONSIDERED, PETITIONER PRAYS:

1. That the defendant be arrested or summoned to appear before this Court to answer the above charge.
2. That the Court find the defendant to be the natural father of said child (ren).
3. That the Court order the defendant to pay such sums for the support and maintenance of said child(ren) and such other expenses as the Court may deem proper.
4. That the name of said child remain the same.

FRANCIS A. PICKETT
Petitioner
2075 King Rd. Southaven, Miss. 38671
Address

AFFIDAVIT

STATE OF TENNESSEE
COUNTY OF SHELBY

Before me personally appeared the petitioner in the foregoing petition, who makes oath that the statements therein are true to the best of her knowledge, information and belief.

FRANCIS A. PICKETT
Petitioner

Sworn to and subscribed before me this 12th day of May, 1978

WILLIAM G. FULMER, CLERK OF COURT

IN THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY

Docket No. 31870

Circuit Court 64761-4 R.D.

FRANCES ANNETTE PICKETT, PLAINTIFF,

vs.

BRAXTON BROWN, DEFENDANT.

PLAINTIFF'S MOTION CHALLENGING THE CONSTITUTIONALITY OF A PORTION OF T.C.A. § 36-224 (2)—July 9, 1979

TO THE HONORABLE KENNETH A. TURNER, JUDGE OF THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY, TENNESSEE:

In this cause a petition to establish the paternity of JEFFREY LEE PICKETT, born November 1, 1968 was filed by the plaintiff on May 12, 1978. On June 6, 1978 the petition was transferred to the Circuit Court of Shelby County at the request of the defendant.

On April 30, 1979 the defendant filed a motion to the Circuit Court to dismiss this cause of action based on the statute of limitations set forth in T.C.A. § 36-224 (2). The Circuit Court entered an order on May 8, 1979 remanding this cause to the Juvenile Court for a hearing on that issue.

The defendant relies upon a clause from T.C.A. § 36-224 (2) which reads:

> ... but shall not be brought after the lapse of more than two (2) years from the birth of the child; unless paternity has been acknowledged by the father in writing or by the furnishing of support.

It is the defendants contention that:

1) since he has never acknowledged the child or furnished any support; and
2) since the child was born November 1, 1968 (more than two (2) years prior to the start of this suit);

that the statute of limitations applies as set forth above and this action is precluded by law.

The Plaintiff's reply is two-fold.

I.

First the Plaintiff would ask to be allowed to amend her petition to bring the paternity suit in the name of her child who seeks to be legitimated.

II.

Second, your plaintiff challenges the constitutionality of so much of T.C.A. § 36-224 as would bar this action. Said statute has two parts in terms of a statute of limitations. The first says a suit must be brought within two (2) years of the birth of the child. The second says if the child is, or is about to become, a public charge then the suit may be brought anytime prior to the child's eighteenth (18th) birthday.

A.

The statute unconstitutionaliy discriminates against the plaintiff and her son denying her and her son equal protection of the law and thus violating the 14th Amendment to the United States Constitution and Article 1, Section 8 of the Tennessee Constitution.

B.

The statute amounts to cruel and unusual punishment in violation of the 8th Amendment to the United States Constitution and Article 1, Section 8 of the Tennessee Constitution.

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as

well as an unjust—way of deterring the parent. 406 U.S. at 175

C.

The statute deprives the child of due process of law in that the child's right to be legitimate is cut off before he is of sufficient age to exercise his right. This is a violation of the 5th and 14th Amendment to the United States Constitution and Article 1, Section 8 of the Tennessee Constitution.

WHEREFORE, PREMISES CONSIDERED, PETITIONER PRAYS that this Honorable Court declare that portion of T.C.A. § 36-224 which seeks to limit this cause of action to that period of time prior to said child's second birthday unconstitutional and remand this cause of action back to the Circuit Court for a jury trial on the issue of paternity.

Respectfully Submitted

HORNE & PEPPEL, P.C.

/s/ HAROLD W. HORNE

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CERTIFICATE OF SERVICE (omitted in printing)

IN THE JUVENILE COURT OF TENNESSEE FOR SHELBY COUNTY, AT MEMPHIS

No. 31870

FRANCES ANNETTE PICKETT, PLAINTIFF,

Vs.

BRAXTON BROWN, DEFENDANT.

ORDER FOR BLOOD TEST AND GENERAL CONTINUANCE
December 3, 1979

In this cause, upon motion of Braxton Brown, defendant, by and through his attorney, request was made that the plaintiff, Frances Annette Pickett, and her child, Jeffrey Lee Pickett, submit to a blood test offered by Dr. Argall at Baptist Hospital, 899 Madison Avenue, Memphis, Tennessee, the defendant having already submitted to such test and the plaintiff and her child having failed to submit to same at the appointed time. It was further moved by the defendant, by and through his attorney, that the plaintiff, by and through her attorney, be required to make such appointments and arrangements with Dr. Argall to submit to, and complete, the series of blood tests begun by the defendant with Dr. Argall. Finally, motion was made by the defendant, by and through his attorney, that a general continuance be granted until such time as the results of the requested blood test be obtained and that any setting for a ruling on the constitutionality of the statute of limitations for Petitions to Establish Paternity be deferred until the results of Dr. Argall's test be obtained and submitted to the Court.

The plaintiff's attorney having not appeared to contest same;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff, Frances Annette Pickett, and her child, Jeffrey Lee Pickett, submit to the blood test begun by the defendant, Braxton Brown, and offered by Dr. Argall at Baptist Hospital, 899 Madison Avenue,

Memphis, Tennessee; that the plaintiff's attorney make arrangements for same with Dr. Argall, the plaintiff and her child; that a general continuance be granted in the cause; that a setting for a ruling on any constitutional issues concerning the plaintiff's cause abide the results of Dr. Argall's test.

This 3rd day of December, 1979.

/s/ _____
JUDGE

/s/ JAMES R. MCGARRH, JR.

Attorney for Defendant
Suite 1930-100 No. Main Bldg.
Memphis TN 38103
526-2126

IN THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY, TENNESSEE

Docket No. 31870
Circuit Court 64761-4 R.D.

FRANCES ANNETTE PICKETT, PLAINTIFF,

vs.

BRAXTON BROWN, DEFENDANT.

MOTION FOR RE-HEARING—Dec. 8, 1979

Pursuant to Rule 12 of the Juvenile Court, Plaintiff moves the Court for a re-hearing on the matter of blood tests and for cause states:

1. That on Thursday, November 29, 1979, a motion was pending before this Honorable Court challenging the constitutionality of the statute of limitations in paternity cases. That was the only motion pending before the Court on that date. Plaintiff's counsel was not present for oral argument as argument had been previously submitted by memorandum.

2. That there was no motion pending before the Court as to the issue of blood tests on November 29, 1979 and thus it was improper for the Defendant to argue that matter before the Court without giving proper notice to adverse counsel.

3. That there are important issues and facts which Plaintiff's counsel feels the Court should be appraised of regarding the order for blood tests in this cause. Specifically, Plaintiff requests that the Court order the Defendant to submit himself to an HLA blood test, the expense of which will be borne by the Plaintiff.

CERTIFICATE OF SERVICE
(Omitted in printing)

HORNE & PEPPEL, P.C.

/s/ _____

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761-3140

IN THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY, TENNESSEE

Docket No. 31870
Circuit Court 64761-4 R.D.

FRANCES ANNETTE PICKETT, PLAINTIFF

vs.

BRAXTON BROWN, DEFENDANT.

ORDER REQUIRING PLAINTIFF TO SUBMIT TO BLOOD TESTS—January 21, 1980

This cause was heard Tuesday, January 8, 1980, before the Honorable Kenneth A. Turner, Judge of the Juvenile Court upon Plaintiff's motion for a re-hearing. After argument of counsel for each of the parties, it was the opinion of the Court that the Plaintiff should submit to a blood test of the Defendant's choosing as soon as possible. The Court is further of the opinion that its ruling as to any Constitutional matters should not be made until the results of the blood tests are determined.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiff shall submit to Dr. Argall's standard blood grouping tests, the participation of the plaintiff and her child to be arranged for by the plaintiff and paid for by defendant, the defendant having earlier submitted to this test.

/s/ _____
KENNETH A. TURNER—JUDGE
DATE: January 21, 1980

/s/ _____
HAROLD W. HORNE
Attorney for Plaintiff

/s/ _____
JAMES R. MCGARRH, JR.
Attorney for Defendant

IN THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY, TENNESSEE

No. 31870

JEFFREY LEE PICKETT BY NEXT FRIEND, FRANCES ANNETTE PICKETT, AND FRANCES ANNETTE PICKETT, MOTHER OF JEFFREY LEE PICKETT, PLAINTIFF,

vs.

BRAXTON BROWN, DEFENDANT.

ORDER DECLARING A PORTION OF T.C.A. 36-224 (2) UNCONSTITUTIONAL AND AMENDING PLAINTIFF'S PETITION—April 24, 1980

I

Frances Annette Pickett has filed a petition to establish paternity pursuant to Tennessee Code Annotated § 36-222 et seq. alleging that Braxton Brown is the natural father of her son, Jeffrey Lee Pickett, born November 1, 1968. This petition was filed May 24, 1978, roughly ten years after Jeffrey's birth.

Braxton Brown denied paternity and in reply alleged that he "has never, in or by any writing or other means, acknowledged or furnished any support to Jeffrey Lee Pickett, born November 1, 1968, to Frances Annette Pickett." Based upon this answer, the Defendant moved to dismiss this paternity suit based upon the two year statute of limitations set out in Tennessee Code Annotated § 36-224 (2).

Plaintiff replied by filing a motion challenging the constitutionality of the two year statute of limitations as set out in Tennessee Code Annotated § 36-224 (2) and further moving to amend her petition to also bring the paternity suit as next friend in behalf of her child. Notice was given to the Attorney General of Tennessee who intervened to uphold the statute's constitutionality. The parties are all in agree-

ment that if the statute of limitations is constitutional, this petition to establish paternity must be dismissed.

This Court finds that the two year statute of limitations as set out in Tennessee Code Annotated § 36-224 (2) violates the equal protection clause of the United States Constitution as well as Article 1, Section 8 and Article 11, Section 8 of the Tennessee Constitution and accordingly so rules.

II

A child born out of lawful wedlock has a right to support from his father. Tennessee Code Annotated § 36-223, *Brown* v. *Thomas* (1968), 221 Tenn. 319, 426 S.W. 2d 496. His mother as caretaker and natural guardian merely serves as a proper person to receive the support benefits due and owing a child born out of lawful wedlock, and she can not contract away the child's right or release the putative father's obligation. *Reynolds* v. *Richardson* (App. 1971), 483 S.W. 2d 747, cert. denied, *Reynolds* v. *Tennessee* (1973), 410 U.S. 944, 35 L. Ed. 2d 611, 93 S. Ct. 1381. A right of a child born out of lawful wedlock to obtain support is a continuing right until the child reaches the age of 18 years. This right may be enforced by a paternity suit under Tennessee Code Annotated § 36-222 et seq., which is both an action to determine paternity and an action for child support. Tennessee Code Annotated § 36-224 (2) imposes a two year statute of limitations within which the right of a child born out of lawful wedlock to parental support must be asserted, *unless the child is or is about to become a public charge*, but no such limitation is imposed on the support rights of a child born in wedlock who has a court enforceable right to support in Tennessee until age 18. By enacting this statutory limitation on the time in which paternity actions may be brought, the Legislature is treating children born out of lawful wedlock differently from children born in wedlock. Because of this statute, the rights of a child born out of wedlock to support may be foreclosed forever by the failure of his mother to file a suit through her ignorance, neglect, or collusion with the father and through no fault of the child.

The State, through the Attorney General, argues that the two year statute of limitations is essentially a rule founded upon the State's legitimate interest in preventing litigation of stale or spurious claims.

Two important State objectives are in conflict: the State's interest in the welfare of its children versus the State's interest in preventing stale claims. The child's welfare is paramount. If this child was, or was about to become, a public charge, the State or any person (pursuant to Tennessee Code Annotated § 36-224 (2)) could bring a paternity petition against Braxton Brown. Certainly the possibilities of fraud, perjury, or litigation of stale claims is no more inherent in a case brought by a child who is not receiving public assistance than by a case brought for a child who is a public charge.

The Attorney General further argues that the State has a strong interest in protecting the public treasury and in assuring that at least one person will be financially responsible for a child. This interest does not exist when the child is not a public charge and is supported by its mother or some other person. When the child requires welfare payments to subsist, however, the State acquires a strong interest in identifying the father.

This argument contradicts itself and does not serve the public policy of Tennessee. Were this case to be dismissed based upon the two year statute of limitations, Frances Annette Pickett would be encouraged to quit her employment and join the welfare rolls in order to legitimate her child. In fact, this entire controversy could be circumvented by Ms. Pickett's terminating her employment and applying for welfare. Thus, were the two year statute of limitations to be constitutional, it would encourage the mothers of children born out of wedlock to seek public assistance in order to bring paternity proceedings.

III

Not only does the statute of limitations discriminate between children born in and out of wedlock, but it further discriminates between children born out of wedlock who are receiving public assistance and such children whose

mothers are not receiving public assistance. Both parents are obligated to support their children. The fact that one parent is supporting a child does not terminate the other parent's obligations to contribute toward the support of the child. Under the present statute, a child who relies on the State welfare rolls for his subsistence may be legitimated at any time prior to his 18th birthday. A child who is not supported by the State, however, may be legitimated only up to his second birthday—unless his father acknowledges paternity.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That Petitioner, Frances Annette Pickett, is allowed to amend her complaint to bring this petition to establish paternity in her name and in the name of her child by her as next friend;

2. That the portion of Tennessee Code Annotated § 36-224 (2) which provides an action shall not be brought after this lapse of more than two (2) years from the birth of this child, unless paternity as been acknowledged by the father in writing or by the furnishing of support is unconstitutional;

3. The Attorney General and the Defendant have prayed an interlocutory appeal from this order pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure and Tennessee Code Annotated § 16-408. It is hereby certified that the constitutionality of the statute of limitations as set forth in Tennessee Code Annotated § 36-224 (2) is the sole determining question of law in the present proceedings, and that there is substantial ground for difference of opinion as to this issue. An immediate appeal from the present order may materially advance the ultimate determination of the litigation and result in a net reduction in the duration and expense of this litigation if the present order is reversed, since the existence of the statute of limitations will affect the entire conduct of the trial proceedings and the nature of the evidence on which the Court must base its decision. Furthermore, the practice in other courts is now inconsistent with the present order, and there is need to develop a uniform body of law in this area.

It is therefore ordered that an interlocutory appeal is hereby granted on the issue of whether the statute of limitations as set forth in Tennessee Code Annotated § 36-224(2) is constitutional.

ENTERED this 24 day of April, 1980.

/s/ _____
JUDGE KENNETH A. TURNER

APPROVED FOR ENTRY:

/s/ _____
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/s/ _____
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IN THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY, TENNESSEE

Docket No. 31870
Circuit Court No. 64761-4 R.D.

FRANCES ANNETTE PICKETT, PLAINTIFF,

vs.

BRAXTON BROWN, DEFENDANT

STATEMENT OF THE EVIDENCE

Pursuant to Rule 24(c) of the Tennessee Rules of Appellate Procedure, the defendant and the intervenor Attorney General submit the following statement of the evidence or proceedings:

The plaintiff, Frances Annette Pickett, brought suit in Juvenile Court against the defendant Braxton Brown, seeking an order declaring the defendant to be the father of her child and requiring him to pay child support. The defendant denied paternity and the case was transferred to Circuit Court for a jury trial under T.C.A. § 36-227. The plaintiff filed a motion for summary judgment, attaching the affidavit of Frances Annette Pickett, representing that the defendant was the father of her child. The defendant filed a motion to dismiss, contending that the action was barred by the two-year statute of limitations set forth in T.C.A. § 36-224(2). Without ruling on these motions, the Circuit Court remanded the case to Juvenile Court. In Juvenile Court, the plaintiff filed a motion seeking a declaration by the Court that the two-year statute of limitations relied upon by the defendant was unconstitutional. The Attorney General received notice and intervened to defend the constitutionality of the statute. The parties' motions were heard by the Juvenile Court referee, who found in favor of the plaintiff and held that the defendant's motion to dismiss should be overruled. The defendant requested a rehearing before the judge of the Juvenile Court. The Juvenile Court ordered a continuance pending completion of

blood tests of the parties, but the results of the blood tests were not introduced into evidence. The Juvenile Court subsequently held unconstitutional the two-year statute of limitations set forth in T.C.A. § 36-224(2) and granted permission for an immediate appeal. Aside from the affidavit of Frances Annette Pickett submitted with the plaintiff's motion for summary judgment in Circuit Court, no evidence has been introduced in the trial court in this action.

The undersigned hereby certify the foregoing statement of the evidence as an accurate account of the proceedings in the trial court, to the best of their knowledge and information.

Respectfully submitted,

/s/_____

LEE BRECKENRIDGE
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

/s/_____

JAMES R. MCGARRH, JR.
Attorney for Defendant

CERTIFICATE OF SERVICE (omitted in printing)

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

No. D-31870

FRANCES ANNETTE PICKETT, PLAINTIFF-APPELLEE,

v.

BRAXTON BROWN, DEFENDANT-APPELLANT,

WILLIAM M. LEECH, JR., INTERVENOR-APPELLANT

ORDER—June 9, 1980

Upon consideration of the joint application for permission to appeal, it is the decision of this Court that the application be and the same is hereby granted.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE AT JACKSON

For Publication
August 30, 1982.

SHELBY JUVENILE
HON. KENNETH A. TURNER, JUDGE.

FRANCES ANNETTE PICKETT, PLAINTIFF-APPELLEE

vs.

BRAXTON BROWN, DEFENDANT-APPELLANT
WILLIAM M. LEECH, JR., INTERVENOR-APPELLANT

For Plaintiff-Appellee:
Harold W. Horne
Memphis, Tennessee

For Defendant-Appellant:
James R. McGarrh, Jr.
Memphis, Tennessee

For Intervenor-Appellant:
Lee Breckenridge
Assistant Attorney General
Nashville, Tennessee

OPINION—Aug. 30, 1982

REVERSED and DISMISSED. DROWOTA, J.

This appeal seeks to uphold the constitutionality of the two-year statute of limitations upon an action to establish paternity, found in TCA § 36-224(2).[1] The action was brought in May, 1978, to establish the paternity and obtain

[1] The statute reads:

> Proceedings to establish the paternity of the child and to compel the father to furnish support and education for the child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the lapse of more than two (2) years from the birth of the child, unless paternity has been acknowledged by the father in writing or by the furnishing of support. Provided, however, that the department of human services or any person shall be empowered to bring a suit in behalf of any child under the age of eighteen (18) who is, or is liable to become a public charge.

an order for support of a child born in November, 1968. The defendant argued that since the action was brought more than two years after the child's birth, and he had never acknowledged the child in writing or by furnishing support, the action was barred. The plaintiff mother filed a motion challenging the constitutionality of the section. She sought to amend her petition so as to bring it in the name of the child.

Plaintiff's grounds for urging unconstitutionality were: (1) that the two-year period denied her and her son equal protection of the law under the federal and state constitutions; (2) that it amounted to cruel and unusual punishment (not seriously pressed by plaintiff); and (3) that it deprived the child of due process of law in cutting off his rights before he was old enough to exercise them. Her argument was basically that children born out of wedlock were denied substantial benefits accorded to other children, since children born in wedlock may sue their fathers for support throughout their minority.

The Attorney General was allowed to intervene, since constitutionality was in issue. He argued that plaintiff had no standing to challenge the constitutionality of the exception for public charges, but that in any event, such exception was constitutional as an extension of the sovereignty of the state and because there was a rational basis for making this exception. Further, the general two-year period was constitutional because it was not a limitation upon illegitimates' right to support, which was equal to that of legitimate children. Rather, the limitation was upon establishing paternity, and was justified by the state's interest in preventing litigation of stale or spurious claims. The defendant separately argued that the statute merely limited "the time in which a mother who is able to support her child may seek reimbursement from the alleged father," and the time in which the State may seek reimbursement.

The juvenile court allowed the child to be added as a plaintiff, and held the two-year portion of the statute unconstitutional. The effect is to allow an action to be brought throughout the child's minority. The court reasoned that an illegitimate child has a right, continuing throughout minori-

ty, to support from his father. The right is enforced by an action brought under TCA § 36-222. However, such an action must, in general, be brought within two years of the child's birth, while no such limitation is imposed upon a child born in wedlock. The result is that the Legislature has treated illegitimate children differently than legitimate children. Additionally, an illegitimate child's right to support may be cut off by his mother's failure to act, with no fault on the part of the child.

The trial court also ruled that the two-year period put two state interests—the welfare of its children and preventing stale claims—in conflict. The court held that the stale claim reasoning failed because the state or any person may sue during eighteen years, when the child becomes a public charge. The court also found discrimination between children born out of wedlock, some of whom are public charges and some of whom are supported privately; even if the mother did support the child, this did not terminate the father's equal obligation to support.

The court allowed an interlocutory appeal by certifying that the constitutionality of TCA § 36-224(2) was the sole determinative question of law in the proceedings. TRAP 9, TCA § 16-408.

In ruling on the equal protection challenge to the statute, we begin our discussion with *Mills v. Habluetzel*, 50 U.S.L.W. 4372 (April 5, 1982).[2] This case held unconstitu-

[2] Because of the clarity and relevance of the *Mills* opinion we do not find it necessary separately to review and comment upon the line of cases decided by the Court in recent years, dealing with classifications based upon illegitimacy. *See Lalli v. Lalli*, 439 U.S. 259, 99 S. Ct. 518, 58 L. Ed. 2d 503 (1978); *Trimble v. Gordon*, 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977); *Mathews v. Lucas*, 427 U.S. 495, 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976); *Jimenez v. Weinberger*, 417 U.S. 628, 94 S. Ct. 2496, 41 L. Ed. 2d 363 (1974); *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619, 93 S. Ct. 1700, 36 L. Ed. 2d 543 (1973); *Gomez v. Perez*, 409 U.S. 535, 93 S. Ct. 872, 33 L. Ed. 2d 56 (1973); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 92 S. Ct. 1400, 31 L. Ed. 2d 768 (1972); *Labine v. Vincent*, 401 U.S. 532, 91 S. Ct. 1017, 28 L. Ed. 2d 288 (1971); *Levy v. Louisiana*, 391 U.S. 68, 88 S. Ct. 1509, 20 L. Ed. 2d 436 (1968); *Glona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73, 88 S. Ct. 1515, 20 L. Ed. 2d 441 (1968).

tional a Texas statute, § 13.01 of Chapter 13, Title 2 of the Texas Family Code:

> A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.

This statute was challenged on equal protection and due process grounds. Upholding the equal protection challenge, the Court did not discuss the due process issue.

The Texas Family Code, governing determinations of paternity and entitling illegitimate children to seek such a determination and establish a paternal duty of support, was Texas' response to the Court's earlier opinion in *Gomez v. Perez*, 409 U.S. 535, 93 S. Ct. 872, 35 L. Ed. 56 (1973). Before *Gomez*, illegitimates in Texas had had no judicially enforceable right to support from the natural father. As the Court stated in *Gomez*,

> ... a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.

Id. at 538, 35 L. Ed. 2d at 60.

Thus, in *Mills*, the Court had to determine whether it was constitutional for Texas to grant a right to legitimation and support, but then place a one-year statute of limitations upon the bringing of the action. The Court held that this scheme was unconstitutional. "It would hardly satisfy the demands of equal protection and the holding of *Gomez* to remove an 'impenetrable barrier' to support, only to replace it with an opportunity so truncated that few could utilize it effectively." 50 U.S.L.W. at 4373. Although Texas law permitted the paternity action to be brought by any person with an interest in the child, the mother would usually be the person who would sue. For her, there would be such obstacles to bringing a suit within a year that she

would effectively be denied the opportunity to sue. The hindrances listed by the Court included financial difficulties, continuing affection for the father, shame and embarrassment, and confusion. Since *any* suit had to be brought within a year, such time was not long enough for the state, once a claim should be assigned to it, to take steps to sue.

The Court also held that one year was "not substantially related to the State's interest in avoiding the prosecution of stale or fraudulent claims." *Id.* at 4374. Problems of proof do not "justify a period of limitation which so restricts those rights as effectively to extinguish them." *Id.*

Considering this holding, we look at other language in the Court's opinion which would cast light upon a two-year limitation:

> The fact that Texas must provide illegitimate children with a bona fide opportunity to obtain paternal support does not mean, however, that it must adopt procedures for illegitimate children that are coterminous with those accorded legitimate children. Paternal support on behalf of illegitimate children contain an element that such suits for legitimate children do not contain: proof of paternity. Such proof is often sketchy and strongly contested, frequently turning upon conflicting testimony from only two witnesses. Indeed, the problems of proving paternity have been recognized repeatedly by this Court. *Parham v. Hughes*, 441 U.S. 347, 357, 361 (1979); *Lalli v. Lalli*, 439 U.S. 259, 269 (1978); *Trimble v. Gordon*, 430 U.S. 762, 772 (1977); *Gomez v. Perez*, [409 U.S.] at 538.
>
> Therefore, in support suits by illegitimate children more than in support suits by legitimate children, the State has an interest in preventing the prosecution of stale or fraudulent claims, and may impose greater restrictions on the former than it imposes on the latter. Such restrictions will survive equal protection scrutiny to the extent they are *substantially related to a legitimate state interest.* See *Lalli v. Lalli, supra*, at 265; *Trimble v. Gordon, supra*, at 767, *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). The State's interest in avoiding the litigation of stale or fraudulent claims will justify those periods of limitation that are sufficiently long to present *a real threat of loss or diminution of*

evidence, or an increased vulnerability to fraudulent claims.

> The equal protection analysis . . ., therefore, focuses on two related requirements. *First, the period for obtaining support . . . to illegitimate children must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims.*

Id. at 4373-4374 (emphasis added).

During the pendency of the *Mills* case, the Texas Legislature increased the limitation period from one to four years. Thus, five Justices joined in a separate opinion to specify that by disapproving of a one-year statute, the Court did not wish to imply approval of a period longer than one year. We take this to mean simply that the Court does not wish to prejudge any other period or any other statute, but would consider each one on its own merits and how well it meets the problems discussed by the Court in *Mills*. The separate opinion notes the Court's listing of circumstances surrounding the birth of an illegitimate child, which made a one-year period unconstitutional. However, other circumstances could continue for a longer period after birth.

One circumstance was the state's interest, in addition to preventing stale and fraudulent claims, in insuring that genuine claims are satisfied. This strong interest in doing justice and reducing the number of people on the welfare rolls, is "peculiar to the State itself." *Id.* at 4375.

A second point favoring a longer period was the fact that a paternity suit was one of the few causes of action under Texas law where the limitation period was not tolled during the minority of the plaintiff. "Of all the difficult proof problems that may arise in civil actions generally, paternity, an issue unique to illegitimate children, is singled out for special treatment." *Id.*

A third factor which could exist past the first year of life was the relationship among the parties: a continuing relationship between the parents, financial support from the fa-

ther, or perhaps the child's living with the father or his relatives.

In examining the constitutionality of a two-year, as opposed to a one-year, statute, it would also be instructive to review various state court decisions, even though these preceded the *Mills* decision.

1. The period held constitutional in *In re People in the Interest of L.B.*, 179 Colo. 11, 498 P.2d 1157 (1972), *appeal dism. sub nom. Colorado in the Interest of L.B. v. L.V.B.*, 410 U.S. 976, 93 S.Ct. 1497, 36 L.Ed. 2d 173 (1973), was five years from the child's birth, unless the father had acknowledged paternity in writing or by furnishing support. The Colorado Supreme Court distinguished the duty of support, owed equally to legitimate and illegitimate children, from the threshold establishment of the paternal relationship, a duty borne by illegitimates only. The burden of proving this relationship and thus the obligation to support is greater "where paternity is denied by the putative father. The difference in the two situations and the uncertainty of relationship attendant on illegitimacy is sufficient to justify treatment as two different classes for constitutional purposes." 498 P.2d at 1161.

The court held, with citations, that legislatures may enact statutes of limitations which "put infants and adults on the same footing, ... and this is the effect of a statute containing no savings clause exempting infants." *Id.*

2. A landmark state case on this subject is *Cessna v. Montgomery*, 63 Ill. 2d 71, 344 N.E.2d 447 (1976). The Illinois Code provided that *once paternity was established*, legitimate and illegitimate children had an equal right to support. An action to determine paternity had to be brought within two years after the child's birth, *except* that where the father had acknowledged the child under oath or provided support, the action could be brought within two years of such an act on the father's part. The putative father's absence from Illinois also tolled the running of the statute.

The mother challenged the limitation on equal protection and due process grounds. The court reviewed the United States Supreme Court cases decided prior to that time, the most relevant of which was *Gomez v. Perez*, *supra*, noting

that "[t]his appeal, therefore, picks up where *Gomez* left off. The broad question here is to what extent a State may limit or burden the right of an illegitimate child to bring a paternity action." 344 N.E.2d at 452. The court was aware

> [t]hat proof of paternity places a burden on illegitimate children not shared by legitimate children . . .; it is also unavoidable. (H. Krause, Illegitimacy: Law and Social Policy 82 (1971); Note, *Illegitimacy and Equal Protection*, 49 N.Y.U.L. Rev. 479, 511 (1974).) Illegitimate children differ fundamentally from legitimate children in that at birth they have no legal relationship to their natural father. In the language of equal protection analysis, legitimate and illegitimate children are not similarly situated classes. It is not only entirely reasonable but essential that the State require proof of the paternity of illegitimates as a condition to asserting an otherwise equal support right.

Id. at 451-452.

The reasoning employed by the Illinois court in testing the validity of the two-year limitation period is quite similar to that found in *Mills v. Habluetzel*. First, a state may constitutionally limit the time during which an illegitimate child may bring a paternity action. Second, the court recognized the propriety of the state's interest in preventing litigation of stale or fraudulent claims. Third, it was stated that the Legislature could establish "any limitation period it deems appropriate so long as it is not so short as to be tantamount to the impenetrable barrier proscribed in *Gomez*." *Id.* So long as a limitation period cannot be said as a matter of law to be too brief, a court has no power to substitute its judgment for that of the Legislature. "The fact that the support right potentially forfeited is an important one does not authorize this court to select a longer period. We could only remove the limitation altogether . . . ." *Id.*

In light of these principles, basically the same as those voiced by the Supreme Court in *Mills*, the court found that Illinois' two-year statute did not unconstitutionally deny equal protection. The Constitution did not "compel" the court to strike down the statute, *id.* A state study had found, "even with the two-year period, that paternity actions are beset with coercion, corruption and perjury. . . . It

may well be that the longer the period between birth and suit the greater the possibility of fraud. At the very least, a defendant's problems of proof are substantially increased." *Id.*

The due process discussion found in *Cessna* will be mentioned below.

3. The Iowa Supreme Court held its statute constitutional in *State v. Witkowski*, 256 N.W.2d 216 (Iowa 1977), which relied heavily upon the *Cessna* opinion. The statute, § 675.33 of the Iowa Code, read:

> Proceedings to enforce the obligation of the father shall not be brought after the lapse of more than two years from the birth of the child, unless paternity has been judicially established, or has been acknowledged by the father in writing, or by the furnishing of support.

After reviewing the United States Supreme Court cases which had been decided, the court found that the two-year statute did not amount to an insurmountable barrier such as that which had existed in *Gomez v. Perez*, *supra*. It was, instead a *method* of proof and time limitation for proving paternity. Agreeing with the rationale found in *Cessna*, the court found that the Iowa statute was " 'carefully tuned to alternative considerations,' " 256 N.W.2d at 224, a factor which had been found important in United States Supreme court cases. This statute was "carefully tuned" because it provided three exceptions to the two-year period, thus alleviating potential hardships to illegitimates who fit within such exceptions.

4. *Thompson v. Thompson*, 285 Md. 488, 404 A.2d 269 (1979), *app. dismissed*, 444 U.S. 1062, 100 S. Ct. 1002, 62 L. Ed. 2d 745 (1980), upheld Maryland's statute requiring action to be brought within two years of the child's birth, except where the putative father had acknowledged paternity in writing or had provided support, in which case the suit could be brought within two years of the last such act by the father. Md. Code Art. 16, § 66(e) (1973). The statute was part of a revision of the law which had as one of its purposes "the promotion of the general welfare and best interests of [illegitimate] children by securing to them, *as near*

as practical, the same right to support, care and education as legitimate children." *Id.*, § 66A (emphasis added). The court discussed the purpose of statutes of limitations; as to the statute specifically in question, it noted:

> Memories do fade with the passage of time. Circumstances change, too. After the lapse of a number of years from contact with the mother of an illegitimate child an accused male might have substantial difficulty in establishing that he was not the only individual who could have sired the child in question. This might be because changed family circumstances could cause individuals who previously would have so testified to be unwilling to state that they had sexual intercourse with the child's mother at a time when they could have sired the child in question. . . . We find no fundamental right of the child affected by this statute.

404 A.2d at 273. *Thompson* also discussed the due process challenge, with which we shall deal below.

5. An interesting interpretation of legislative purpose is found in *Matter of Mores v. Feel*, 73 Misc. 2d 942, 343 N.Y.S. 2d 220 (Fam. Ct. N.Y. Co. 1973). Under § 517 of the New York Family Court Act, action had to be brought within two years after the child's birth, unless the father had acknowledged paternity in writing or by furnishing support. However, if the mother or child was or was likely to become a public charge, the public welfare officials could sue within ten years after the birth. In this case, the putative father challenged the constitutionality of this distinction, which affected the liability of a father based upon the mother's income level.

The court criticized *Matter of Wales v. Gallan*, 61 Misc. 2d 681, 306 N.Y.S.2d 614 (Fam. Ct. Richmond Co. 1969). That case had held the two-year period unconstitutional, extending the limit for any suit to ten years. That case was never reviewed by a higher court, so did not become precedent. The *Mores* case found that *Wales* had not correctly analyzed the legislative purpose and related it to the classification created by the statute. *Mores* held that the legislative purpose was clearly not to assure to all illegitimates an equal chance of establishing paternity, or to make all putative fathers equally liable to paternity suits. Rather, it was

more likely to assure that illegitimates were supported and educated by someone (mother, father, or public welfare), and to protect society by preventing the child from becoming a public charge if one of the other sources of private support was available (*citing* 10 Am. Jur. 2d *Bastards* § 75 (1963)). The statute seemed to the *Mores* court a very rational means of fulfilling such an objective.

The fact that the Legislature could have subjected the state to the same two-year period did not render unconstitutional the use of two different periods.

The court also noted the serious due process problem—that of obtaining proof—created for the father by a possible ten-year lapse. However, even the distinct possibility that after ten years many men would be subjected "to what is potentially a drumhead trial," 343 N.Y.S.2d at 226, did "not compel the conclusion that the 10-year statute was unconstitutional under the Due Process Clause," *id.*

The plaintiff mother in the case at bar argues, in addition to her equal protection challenge, that Tennessee's statute of limitations results in an unconstitutional denial of due process of law under the federal and state Constitutions. She states,

> The statute of limitations as drafted allows a child's right to paternal support to terminate before the child has any real opportunity to assert it. Permitting a child's mother to institute paternity proceedings in behalf of her offspring does not satisfy the requirements of due process because the mother's short term interests, i.e., continuing fondness for the father or her reluctance publicly to reveal her indiscretion, may conflict with the child's long term interests of support and legitimation.[3]

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[3] TCA § 36-224(1) allows suit to be brought by the mother or her personal representative. If the child is likely to become a public charge, suit may be brought by the state department of human services or by any person. If the mother is dead or disabled, suit may be brought by the child through a guardian or next friend.

The Supreme Court in *Mills*, *supra*, did not reach the due process issue because it held that Texas' one-year statute denied equal protection. However, since it held that a state could enact a limitation period shorter than a child's minority, 50 U.S.L.W. at 4373; and because it recognized that "during the child's early years [a paternity action] will often be brought by the mother," *id.* at 4374, we conclude by inference that to allow the mother to sue, and to grant her a time shorter than the child's minority, would not in and of itself be any more unconstitutional on due process grounds than it would be on equal protection grounds. The inquiry, then, remains essentially the same: whether the state's policy as reflected in the statute affords a fair and reasonable opportunity for the mother to decide in a rational way whether or not the child's best interest would be served by her bringing a paternity suit.

Other courts have addressed this issue and found such a statutory scheme constitutional. We quote at length from *Cessna* v. *Montgomery*, *supra:*

> The question, of course, is whether authorizing only the mother to bring suit unreasonably hinders the child's opportunity to secure support from his natural father. Obviously, the action must be brought by some person on the child's behalf, for the child cannot do so himself within the limitation period. And, we note parenthetically, it is within the competence of the legislature to enact a limitation period not tolled during minority. [Citations.]
>
> Possible legislative alternatives would include authorizing an action by a next friend or guardian. Plaintiffs argue that under no circumstances should the mother be permitted to sue on behalf of the child since their interests are potentially adverse. (See H. Krause, Illegitimacy: Law and Social Policy 113, 151-52 (1971); Note, *Illegitimacy and Equal Protection*, 49 N.Y.U.L. Rev. 479, 530 (1974); Gray & Rudovsky, *The Court Acknowledges the Illegitimate: Levy* v. *Louisiana and Glona* v. *American Guarantee & Liability Insurance Co.*, 118 U.Pa.L. Rev. 1, 25 (1969).) Her continuing fondness for the father or her reluctance to publicly reveal her indiscretion could re-

> sult in a decision to forego an otherwise viable suit. We do not deny this possibility exists. Yet plaintiffs' argument assumes that the child's interest is always best served by prompt suit against the father. Society still regards an illegitimate birth as something of a scandal, however, and the best interests of the child in a particular case may not always lie in the direction of public action against the natural father. It seems to us that the mother is ordinarily best positioned to make this difficult decision. Moreover, once a decision has been made to file an action, the interests of mother and child substantially coincide. Support for this conclusion is to be found in *Pittman* v. *United States* (9th Cir. 1965), 341 F.2d 739, where the court held a minor's tort claim against the government could constitutionally be barred after two years although he had no guardian *ad litem*, and despite a claimed conflict of interest that may have caused the father to subordinate his son's interest. The court specifically rejected plaintiff's contention that his right was meaningless because he could not act for himself during his minority.
>
> In our judgment the General Assembly could reasonably conclude that the support right of an illegitimate child is best protected by requiring the action to be brought by the mother, and that the potential harm to putative fathers defending stale claims is, on balance, greater than the potential harm to illegitimate children whose support right is forfeited by the mother's inaction.

344 N.E.2d at 453. The highest court of Maryland agreed with this reasoning in a discussion found in *Thompson* v. *Thompson*, *supra*, 404 A.2d at 273.

In *Reynolds* v. *Richardson*, 483 S.W.2d 747 (Tenn. App. 1971), *cert. denied*, 410 U.S. 944, 93 S. Ct. 1381, 35 L. ed. 2d 611 (1973), the Court of Appeals held that when the mother and grandparents of an illegitimate child accepted $500 from the parents of the putative father in exchange for their agreement not to bring any action against him, this did not release the *child's* cause of action to establish paternity and for support. The mother had brought an earlier paternity suit which she dismissed upon being paid the $500. The Court of Appeals stated,

> "This statutory duty [of support] inures to the benefit of the child and we do not conceive that the dismissal by the mother of the original warrant could be considered as foreclosing the right to later assert the father's duty to furnish necessary support."
>
> There is a distinction to be made between the release or waiver of the claims of the mother, which can validly be accomplished, and a release of the rights of the infant child which, ordinarily, should not be permitted ...
>
> ...
>
> Accordingly, to the extent that this proceeding is brought by or for the benefit of the mother or maternal grandparents, it will be dismissed.
>
> To the extent that this proceeding is brought by or for the benefit of the infant child, we hold that it is not affected by the above quoted release.

483 S.W.2d at 751-752.

The mother had filed and dismissed the original action very shortly after the child's birth. Thus, it can be distinguished from the case at bar in that the mother could not be said to have had a reasonable time during which to reflect upon and assess what course of action would be in the child's best interests. As a matter of policy, the mother as the party responsible for the child should have the entire two-year limitation period during which to consider a choice which will bind the child. To the extent to which the *Reynolds* opinion appears to hold that no action or decision made by the mother can be allowed to bind the child, it is overruled.

Several state courts have reached a contrary result and held their limitation periods unconstitutional. As mentioned above, *Matter of Wales* v. *Gallan*, *supra*, did so, but has not been looked upon as precedential. Two years was held too short a time during which to allow suit: Mothers might still have, or hope to resume a relationship with the father, or be anticipating voluntary acknowledgment or support from him. In addition to the child's economic interest in establishing paternity, he has a "psychological" interest in knowing who his father is. Turning to the state's countervailing interests in maintaining the limitation, the two-year

period was for the purpose of protecting the putative father from stale claims. This was not rational, because some fathers were subject to a ten-year period. Secondly, the purpose of the ten-year period was to protect the public purse, but the effect of this was to subordinate what should have been the state's primary purpose—protecting the well-being of children. The court's solution was to lengthen the limitation period to ten years for any suit. Thus, the court did *not* hold that illegitimate children had to be treated the same as legitimate children.

The Montana Supreme Court struck down a three-year limitation but retained it as to actions brought by the State. *Montana* v. *Wilson*, 50 U.S.L.W. 2132 (August 8, 1981).

In *Stringer* v. *Dudoich*, 92 N.M. 98, 583 P.2d 462 (1978), the New Mexico Supreme Court held unconstitutional a statute which placed a two-year limitation upon actions for support, except where paternity had been judicially established, or had been acknowledged in writing or by the furnishing of support. There was no limitation upon actions brought by the State.

The court reasoned that illegitimates had the same rights to support as did legitimates. Since there was no time limitation upon the right of a legitimate child to bring an action, *Gomez* v. *Perez* mandated that the same right be extended to illegitimates.

The Florida Supreme Court treated the subject in depth in *State* v. *West*, 378 So. 2d 1220 (Fla. 1979). Section 95.11 (3)(b), Fla. Statutes (1975) required an action to determine paternity to be brought within four years, but under § 95.051 (1)(e), the running of the time was tolled when the putative father made voluntary payments toward support.

The court pointed out that an illegitimate child had a right to support from his father, which right continued until the age of eighteen; and that placing a time limitation upon the enforcement of such resulted in

> the [legislature's] treating legitimate children differently from illegitimate children. Because of this statute, the rights of the illegitimate child to support may be foreclosed forever by failure of his mother to file

> suit through her ignorance, neglect, or sympathy with the father and through no fault of the child.

378 So. 2d at 1222. The court reviewed the then existing Supreme Court opinions to determine that the "substantial relationship" test should be applied in considering whether or not the differing treatment was constitutional.[4]

In this situation, the court could not find a sufficient relationship between this statute and the state's interest in barring state claims, the reason being that the illegitimate's right to support was an ongoing one, continually renewing itself until the child reached eighteen. It was held that requiring suit to be brought within four years created an impenetrable barrier to the child's right, when the state could instead have specified requirements to assure that proof of paternity would be adequate. Besides, the limitation period defeated the state's own interest in children being supported by their natural parents.

In effect, the court held that any limitation period would be unconstitutional because it would result in differing treatment of legitimate and illegitimate children.

We have carefully considered *Mills* v. *Habluetzel*, *supra*, all of the earlier Supreme Court and state court opinions, the various policies and arguments advanced therein, and the arguments of the parties in the case at bar. We do not feel that *Mills* would require a holding of uncon-

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[4] This conclusion seems correct. It is clear that the "strict scrutiny" test has been rejected by the Court, *Trimble* v. *Gordon*, 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977); *Mathews* v. *Lucas*, 427 U.S. 495, 96 S.Ct. 2755, 49 L. Ed. 2d 651 (1976). *Mills* v. *Habluetzel*, *supra*, referred to the limitation as not being "substantially related" to the valid state interest in avoiding litigation of stale or fraudulent claims. When one reads the Supreme Court's numerous opinions concerning classifications based upon legitimacy, one discerns that the Court's objective has been to determine whether there is a rational relationship between the classification and the state interest. However, the relationship must be actual, logical and apparent to the reasonable person. As the Court has put it, "the scrutiny by which their showing is to be judged is not a toothless one, e.g., Jimenez v. Weinberger, 417 U.S. 628, 41 L. Ed. 2d 363, 94 S. Ct. 2496 (1974)," *Mathews* v. *Lucas*, *supra*, 427 U.S. at 511. "In a case like this, the Equal Protection Clause requires more than the mere incantation of a proper state purpose." *Trimble* v. *Gordon*, *supra*, 430 U.S. at 769.

stitutionality here, even though obviously, in the wake of *Mills*, two years becomes the minimum period which could possibly be upheld. It is our opinion that those cases which uphold the constitutionality of limitation periods of two years or longer are the better reasoned. Cases finding unconstitutionality do not appear to recognize a distinction which we feel is important: that between the right to paternal support throughout minority (which exists equally in favor of both legitimates and illegitimates); and the right to establish the identity of the individual who bears such duty of support (wherein legitimates and illegitimates are not similarly situated classes).

In the case of an illegitimate child, the mother (or whoever might sue in her stead) must weigh the circumstances and relationships involved and determine whether it is in the best interests of the child and of herself to bring an action to identify the father, or not to bring an action and assume the entire duty of support herself. The *Mills* case definitively holds that the expressed state interest in having a statute of limitations upon paternity actions—preventing litigation of stale and fraudulent claims—is a valid one. It has held that one year is as a matter of law too short a time for the mother to make a decision, because of financial, emotional and, we might add, physical strains and problems which very often endure through many months after childbirth. Even though these and other circumstances might also endure beyond the first year, we cannot say as a matter of law that the Legislature could not rationally determine that such a possibility became outweighed by the state's interest in prohibiting litigation of stale and fraudulent claims. The Legislature could rationally determine that two years is long enough for most women to have recovered physically and emotionally, and to be able to assess their and their children's situations logically and realistically. It could rationally decide, on the other hand, that to allow longer than two years would unreasonably increase the putative fathers' problems of proof in most cases. Its considerations could include the temporary nature of many relationships outside wedlock; the possibility of the formation of new relationships by the mother, putative father, and

anyone else with whom she might have had relations at the relevant time; the difficulty of producing proof to rebut the mother's testimony; the statistics showing the frequency of false and very subjective testimony in this type of case; and the fact that, by the time two years have elapsed, the mother theoretically could have had another child.

Further, the Tennessee statute is "carefully tuned" to avoid hardship in predictable groups of cases, since it contains an exception for actions against men who have acknowledged their children in writing or by supporting them,[5] and it has been held that in Tennessee, regular or substantial payments are not required in order to constitute "support." *Reynolds* v. *Richardson*, 462 S.W.2d 233 (Tenn. App. 1970). We do not today consider what circumstances outside the statute, if any, could keep the statute from operating in favor of a putative father in a particular case. In any event, the statutory exceptions should satisfy the concerns of the Supreme Court in *Mills*, about conditions persisting beyond one year which could make difficult the bringing of a paternity suit. The state's countervailing interest in doing justice and reducing the number of people on welfare is served by allowing the state a longer time during which to sue. The Court's concern about ongoing relationships among the parties is satisfied by the acknowledgement exceptions. This leaves the Court's concern that the limitation period is unique in not being tolled during the plaintiff's minority, but we do not find that this factor alone requires a holding of unconstitutionality of a two-year period, as opposed to any other period which can end during the plaintiff's minority.

Since the mother is the party primarily authorized by the statute to bring the action, and thus of necessity makes a decision which is binding on the child, we agree with those courts which have held that, for a myriad of reasons, she is the best qualified person to do so. The state has determined that the mother should be allowed to make this important

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[5] TCA § 36-224(2); Justice O'Connor points out in her concurring opinion that the Texas statute does not make exceptions for these "practical obstacles to filing suit within one year."

decision, as it is essentially a private matter. So long as the child is able to be supported privately, the state allows the matter to remain private. If the mother comes to a point where she requires public assistance in order to support the child, the state and its taxpayers acquire an interest which they did not previously have, which accounts for the statute's exception for actions brought by the state.[6]

There are many decisions, both important and minor, arising in many contexts, which are made by parents on behalf of their children. These may have significant and lasting effects upon the children. A woman's decision to shoulder the duty of support and cut herself and the child off from the putative father, is but one example of such a decision. No matter what the limitation period, if it is shorter than the child's minority, the mother would still be the person making or profoundly influencing this decision.

Counsel for the mother in this case raises the possibility that a mother could evade the two-year period by giving up her job, thus losing her source of funds with which privately to support the child; and apply for welfare, thus forcing the state to bring a paternity suit, which can be done throughout the child's minority. Even if this could happen in a few cases, we would note that there are sanctions against abuse of the welfare system; and that such possibility does not render the Legislature's determination to set a two-year period unconstitutional. A mother could resort to such an option no matter how long or short the limitation period.

The mother petitioned to amend her complaint to add the name of the child, by the mother as next friend, as a plaintiff. The court allowed such an amendment, and the defendant and state have not appealed this ruling. However, TCA § 36-224(1) does not permit an action to be brought by the child except in case of death or disability of the mother. This error is harmless, as we hold that this action was barred by the two-year statute of limitations.

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[6] We do not today decide the constitutionality of the eighteen-year exception to the limitation period, from the point of view of a putative father who is sued by the "Department of Human Services or any other person."

We find that the statute of limitations under consideration here meets the test enunciated by the Supreme Court in *Mills:* It is sufficiently long to present a reasonable opportunity for those who may sue, to assert claims on behalf of illegitimate children. Second, the general two-year limitation, although exceptions are provided where other state interests prevail, is substantially related to the state's interest in avoiding the litigation of stale or fraudulent claims. *See Mills, supra*, 50 U.S.L.W. at 4374. Two years, as opposed to one year, is not a period which "remove[s] an 'impenetrable barrier' to support, only to replace it with an opportunity so truncated that few could utilize it effectively." *Id.* at 4373. *Every* illegitimate child can enforce a father's support obligation if a suit to declare paternity is brought, and two years is not, as a matter of law, an unreasonably short time. As the Supreme Court has said in another recent case,

> [f]ew statutory classifications are entirely free from the criticism that they sometimes produce inequitable results. Our inquiry under the Equal Protection Clause does not focus on the abstract "fairness" of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment. . . .
>
> . . . Inheritance [in this case, enforcing the father's support obligation] is barred only where there has been a failure to secure evidence of paternity during the father's lifetime [in this case, within the period of limitations] in the manner prescribed by the State. This is not a requirement that *inevitably disqualifies an unnecessarily large number of children born out of wedlock.*

Lalli v. *Lalli*, 439 U.S. 259, 273, 99 S. Ct. 518, 58 L. Ed. 2d 503 (1978) (emphasis added).

It is not our function to substitute our opinion as to what would be the most desirable policy, for that of the Legislature. TCA § 36-224(2) meets the test of being substantially related to a legitimate state interest. Accordingly, the rulings of the trial court are reversed and this action is dis-

missed. Costs of this appeal shall be borne by the plaintiff-appellee.

Reversed and dismissed.

/s/ FRAN F. DROWOTA, III

FRANK F. DROWOTA, III, *Justice.*

Concur:
Harbison, C.J.
Fones, Cooper and Brock, JJ.

IN THE SUPREME COURT OF TENNESSEE AT JACKSON

SHELBY JUVENILE
REVERSED AND DISMISSED

FRANCES ANNETTE PICKETT, PLAINTIFF-APPELLEE

vs.

BRAXTON BROWN, DEFENDANT-APPELLANT

WILLIAM M. LEECH, JR., INTERVENOR-APPELLANT

JUDGMENT—Aug. 30, 1982

This cause coming on to be heard upon a transcript of the record from the Juvenile Court of Shelby County, briefs and argument of counsel; upon consideration whereof this Court is of opinion that in the judgment of the trial court there is reversible error.

IT IS, THEREFORE, ORDERED AND ADJUDGED by this Court that the rulings of the trial court are reversed and this action is dismissed.

This cause is remanded to the Juvenile Court of Shelby County for the collection of the costs accrued below.

Costs of this appeal are taxed against the plaintiff-appellee, Frances Annette Pickett, for which execution may issue, if necessary.

8/30/82.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

No. Shelby Juvenile 1

FRANCES ANNETTE PICKETT, PLAINTIFF-APPELLEE,

vs.

BRAXTON BROWN, DEFENDANT-APPELLANT,

WILLIAM M. LEECH, JR., INTERVENOR-APELLANT.

NOTICE OF APPEAL
TO
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the plaintiff-appellee herein, Frances Annette Pickett, appeals to the Supreme Court of the United States the judgment entered in the above styled cause by the Supreme Court of Tennessee on August 30, 1982, upholding the constitutionality of the two (2) year statute of limitations as set forth in Tennessee Code Annotated, § 36-224(2). This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ HAROLD W. HORNE

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Memphis, Tennessee 38117
(901) 761-3140

Supreme Court of the United States

No. 82-5576

JEFFREY LEE PICKETT, ETC., ET AL., APPELLANTS,

v.

BRAXTON BROWN, ET AL.

APPEAL from the Supreme Court of Tennessee, Western Division.

The statement of jurisdiction and the motion for leave to proceed herein *in forma pauperis* in this case having been submitted and considered by the Court, the motion of appellants for leave to proceed *in forma pauperis* is granted. In this case probable jurisdiction is noted.

DECEMBER 6, 1982

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NO. 82-5576

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JEFFREY LEE PICKETT by next friend,
FRANCES ANNETTE PICKETT, and
FRANCES ANNETTE PICKETT,
Appellants,

v.

BRAXTON BROWN,

and

WILLIAM M. LEECH, JR.,
Intervenor-Appellee.

On Appeal From The Supreme Court Of Tennessee

MOTION TO DISMISS OR AFFIRM

WILLIAM M. LEECH, JR.
ATTORNEY GENERAL
STATE OF TENNESSEE

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-5576

JEFFREY LEE PICKETT by next friend,
FRANCES ANNETTE PICKETT, and
FRANCES ANNETTE PICKETT, Appellants,

v.

BRAXTON BROWN, Appellee

and

WILLIAM M. LEECH, JR., Intervenor-Appellee.

MOTION TO DISMISS OR AFFIRM

The appellee, William M. Leech, Jr., Attorney General for the State of Tennessee, respectfully moves the Court to dismiss the appeal herein or in the alternative, to affirm the judgment of the Supreme Court of Tennessee on the grounds that the questions presented for review have been clearly ruled upon by this Court and are so unsubstantial as not to need further argument.

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I.

THE STATUTE INVOLVED AND THE NATURE OF THE CASE.

A. The Statute.

This appeal raises the question of the validity of certain provisions of Tennessee Code Annotated § 36-224(2) (Tenn. Pub. Acts 1955, Ch. 186, § 3; 1965, Ch. 36, § 1; Impl. Am. Acts 1975, Ch. 219, § 1).

This statute provides that proceedings to establish paternity shall not be brought after the lapse of more than two (2) years from the birth of the child, unless paternity has been acknowledged by the father in writing or by the furnishing of support. The statute further provides that the Department of Human Services or any person shall be empowered to bring a suit in behalf of any child under the age of eighteen (18) who is, or is liable to become a public charge.

B. The Proceedings Below.

The appellant, Frances Annette Pickett, filed a petition to establish paternity of Jeffrey Lee Pickett (born November 1, 1968) in the Juvenile Court of Memphis in Shelby County, Tennessee on May 12, 1978. The petition to establish paternity was transferred to the Circuit Court of Shelby County on June 6, 1978. On April 30, 1979 the defendant, Braxton Brown, filed a motion to dismiss the cause of action based on the statute of limitations as set forth in Tennessee Code Annotated (T.C.A.) § 36-224(2). The Circuit Court remanded the case to Juvenile Court. In Juvenile Court, plaintiff filed a motion seeking a declaration by the

Court that the two (2)-year statute of limitations relied upon by the defendant was unconstitutional. The Attorney General received notice and intervened to defend the constitutionality of the statute. The Juvenile Court declared unconstitutional the two (2)-year statute of limitations set forth in T.C.A. § 36-224(2). The Juvenile Court authorized the parties to seek an interlocutory appeal and the Supreme Court of Tennessee granted permission to appeal on June 9, 1980.

The appellee, Attorney General William M. Leech, Jr., appealed the decision of the Juvenile Court to the Supreme Court of Tennessee. Appellee contended that the two (2)-year statute of limitation and the public charge exception were substantially related to legitimate state interests. The Supreme Court of Tennessee by decree entered August 30, 1982, upheld the constitutionality of the statute and reversed and dismissed appellant's cause of action.

II.

ARGUMENT

MOTION TO DISMISS

The appellee, Attorney General William M. Leech, Jr., hereby moves to dismiss the appeal on the ground that no substantial federal question is presented; the issues presented in this appeal have been previously settled by this Court.

This Court has previously held that statutory classifications based upon legitimacy which are substantially related to important state interests do not violate

the equal protection clause of the Fourteenth Amendment. Matthews v. Lucas, 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976); Labine v. Vincent, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971); Lalli v. Lalli, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978); Mills v. Habluetzel, ____ U.S. ____, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982).

In Pickett v. Brown the Supreme Court of Tennessee upholds the constitutionality of T.C.A. § 36-224(2) which imposes a two (2)-year statute of limitations on paternity actions. The Court finds that the two (2)-year statute of limitations is sufficiently long to present a reasonable opportunity for those who may sue, to assert claims on behalf of illegitimate children. Further, the general two (2)-year limitation, although exceptions are provided where other state interests prevail, is substantially related to the state's interests in avoiding the litigation of stale or fraudulent claims. Pickett v. Brown, 638 S.W.2d 369, 380 (1982).

In reaching this decision the Court states:

> The legislature could rationally determine that two years is long enough for most women to have recovered physically and emotionally, and to be able to assess their and their children's situations logically and realistically. It could rationally decide, on the other hand, that to allow longer than two years would unreasonably increase the putative father's problems of proof in most cases. Its considerations could include the temporary nature of many relationships outside of wedlock; the possibility of the formation of new relationships by the mother, putative father, and anyone else with whom she might have had relations at the relevant time; the difficulty of producing proof to rebut the mother's testimony; the statistics showing the frequency of false and various objective testimony in this type of case; and the fact that, by the time two years have elapsed, the mother theoretically could have had another child.

This analysis is consistent with this Court's most recent opinion in Mills v. Habluetzel, supra.

Appellant contends that the statute violates the equal protection clause and that it denies illegitimate children the right to sue for paternal support.[1] This Court has clearly stated that restrictions upon illegitimates to establish paternity do not necessarily violate principles of equal protection. This Court recognized in Mills, that "in support suits by illegitimate children more than in support suits by legitimate children, the State has an interest in preventing the prosecution of stale or fraudulent claims, and may impose greater restrictions on the former than it imposes on the latter". Mills v. Habluetzel, 102 S.Ct. 1549, 1554 (1982). Further, this Court has consistently stated that its function is not to hypothesize independently on desirability or feasibility of any possible alternatives to statutory schemes. Lalli v. Lalli, supra; Labine v. Vincent, supra.

Appellant further challenges the constitutionality of T.C.A. § 36-224(2) by alleging that the statute unconstitutionally denies illegitimate children who do not receive welfare or the right to sue for paternal support while imposing no such restriction on illegitimate children who receive welfare. Appellee submits that this statutory provision is a valid legislative classification rationally related to the State's interest in reducing the number of people on welfare. The Supreme Court of Tennessee recognized this interest as a rational basis for the legislative classification in upholding the constitutionality of the statute. Pickett v. Brown, 638 S.W.2d 369, 380 (1982).

---

[1] T.C.A. § 36-224(2) does not deny illegitimates the right to sue for support. Rather, said statute merely cuts off the time within which paternity may be established.

The statutory classifications expressed in the Tennessee statute are rationally related to legitimate state purposes. The purposes articulated by the State Supreme Court have been recognized by this Court as valid. Accordingly, this appeal presents no substantial federal question and should be dismissed.

MOTION TO AFFIRM

Alternatively, the appellee moves to affirm the judgment of the Supreme Court of Tennessee. The analysis and conclusions of the Tennessee Supreme Court are consistent with this Court's most recent opinion regarding the rights of illegitimate children to sue for support and warrant an affirmance by this Court.

In Mills this Court held that states may impose greater restrictions in support suits by illegitimates than in support suits by legitimate children when such restrictions are substantially related to important state interests. Mills v. Habluetzel, supra. The equal protection analysis as articulated in Mills focused on two related requirements: 1) the period for obtaining support must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf and 2) the time limitation placed on the opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims.

The statutory provision which is drawn in question on this appeal imposes a two (2)-year statute of limitations in paternity actions. The statute provides an exception for actions against men who have acknowledged their children in writing or by supporting them to avoid hardship in certain

predictable cases. Further, the statute provides an exception to the two (2)-year statute of limitations to children who are, or are likely to become public charges.

In Pickett v. Brown the Court held the statutory classifications drawn in the statute are substantially related to the State's interest in avoiding stale and fraudulent claims and its countervailing interest in doing justice and reducing the number of people on welfare. Further, the Court found the two-year restriction is long enough in duration to afford illegitimate children an adequate opportunity to obtain support. Pickett v. Brown, 633 S.W.2d 369, 380 (1982). Additionally, in reaching this decision the Tennessee Court considered other provisions of the statute which avoid practical obstacles to filing suit within two (2) years. Pickett v. Brown, supra.

The statutory provision challenged on this appeal has been upheld by the Tennessee Supreme Court based upon the analysis articulated by this Court in Mills. Under this analysis the statute survives equal protection scrutiny and therefore should be affirmed.

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Tennessee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss or Affirm has been forwarded by first-class mail to Mr. Harold W. Horne, HORNE & PEPPEL, 474 S. Perkins, Extended, Suite 205, Memphis, Tennessee 38117, this 17th day of November, 1982.

SUSAN SHORT-KELLY
Assistant Attorney General

IN THE SUPREME COURT OF THE UNITED STATES

October Term of 1982

NO. 82-5576

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SUPREME COURT, U.S.

JEFFREY LEE PICKETT
by next friend,
FRANCES ANNETTE PICKETT,
and FRANCES ANNETTE
PICKETT,

Appellants,

v.

BRAXTON BROWN,

and

WILLIAM M. LEECH, JR.,

Intervenor-Appellee.

AFFIDAVIT OF MICHAEL E. TERRY,
COUNSEL FOR INTERVENOR-APPELLEE

I, Michael E. Terry, being first duly sworn according to law depose and say:

1. That on November 17, 1982, appellee's motion to dismiss or affirm was mailed in a United States Post Office with first-class postage pre-paid and properly addressed to the Clerk of this Court within the time allowed for filing.

2. That the aforesaid motion has been mailed in accordance with the Rules of this Court.

Further affiant saith not.

Michael E. Terry
MICHAEL E. TERRY
Deputy Attorney General

Sworn to and subscribed
before me this 17th
day of November, 1982.

Janet Wright-Lloyd
NOTARY PUBLIC

My Commission Expires:
October 15, 1983

Office-Supreme Court, U.S.
FILED
JAN 20 1983
ALEXANDER L. STEVAS,

No. 82-5576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JEFFREY LEE PICKETT, by next friend,
FRANCES ANNETTE PICKETT, and
FRANCES ANNETTE PICKETT, *Appellants*,

v.

BRAXTON BROWN, *Appellee*,

and

WILLIAM M. LEECH, JR., *Intervenor-Appellee*.

Appeal From The Supreme Court Of Tennessee

APPELLANT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

I.

Whether the two-year statute of limitations of Tennessee Code Annotated, section 36-224 (2) governing paternity and child support actions for illegitimate children violates the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

II.

Whether the two-year statute of limitations of Tennessee Code Annotated, section 36-224 (2) governing paternity and child support actions for illegitimate children violates the due process clause of the Fourteenth Amendment of the Constitution of the United States.

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IN THE

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OCTOBER TERM, 1982

No. 82-5576

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and

WILLIAM M. LEECH, JR., *Intervenor-Appellee*.

Appeal From The Supreme Court Of Tennessee

APPELLANT'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Juvenile Court of Memphis and Shelby County, Tennessee is not reported (J.A. 13).

The opinion of the Supreme Court of Tennessee is reported 638 S.W.2d 369 (J.A. 21).

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Tennessee entered August 30, 1982 (J.A. 42), dismissing appellant's cause of action, forever denies appellants the right to sue for paternal child support and is a final judgment.

A notice of appeal to this Court was filed in the Supreme Court of Tennessee, at Jackson, Tennessee, on September 9, 1982 (J.A. 43).

This appeal was docketed on October 18, 1982, in this Court, within 90 days from the entry of final judgment by the Supreme Court of Tennessee (J.A. 44). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

TABLE OF STATUTES

Chapter 186, Public Acts of Tennessee for 1955, caption:

> An act to provide for the establishment of paternity of a child born out of wedlock and the consequences thereof, for the support and education of a child born out of wedlock, and to provide for enforcement of support orders * * *
> 10

Tennessee Code Annotated, section 28-1-106:

> PERSONS UNDER DISABILITY ON ACCRUAL OF RIGHT. If the person entitled to commence an action is, at the time the cause of action accrued, either within the age of eighteen (18) years, or of

unsound mind, such person, or his representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceed three (3) years, and in that case within three (3) years from the removal of such disability.

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Tennessee Code Annotated, section 34-101:

Fathers and mothers are joint natural guardians of their minor children, and they are equally and jointly charged with their care, nurture, welfare, education, and support, and also with the care, management and expenditure of their estates. * * *

..... 20

Tennessee Code Annotated, section 36-223:

The father of a child born out of wedlock is liable for the necessary support and education of the child. * * *

..... 20

Tennessee Code Annotated, section 36-828:

In a suit for annulment, divorce or separate maintenance, where the custody of a minor child or minor children is a question, the court may, notwithstanding a decree for annulment, divorce or separate maintenance is denied, award the care, custody and control of such child or children to either of the parties to the suit, or to some suitable person, as the welfare and interest of the child or children may demand, and the court may decree that suitable support be made by the natural parents or those who stand in the place of the natural parents by adoption. Such decree shall remain within the control of the court and be subject to such changes or modification as the exigencies of the case may require.

..... 20-21

Tennessee Code Annotated, section 36-224 (1):

A petition to establish paternity of a child, to change the name of the child if it is desired, and to compel the father to furnish support and education for the child, in accordance with this chapter may be filed by the mother, or her personal representative, or, if the child is likely to become a public charge by the state department of human services or by any person. Said petition may be filed in the county where the mother or child resides or is found or in the country where the putative father resides or is found. The fact that the child was born outside this state shall not be a bar to filing a petition against the putative father. After the death of the mother or in case of her disability said petition may be filed by the child acting through a guardian or next friend.

..... 21

Tennessee Code Annotated, section 36-224 (2):

(2) Proceedings to establish the paternity of the child and to compel the father to furnish support and education for the child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the lapse of more than two (2) years from the birth of the child, unless paternity has been acknowledged by the father in writing or by the furnishing of support. Provided, however, that the Department of Human Services or any person shall be empowered to bring a suit in behalf of any child under the age of eighteen (18) who is, or is liable to become a public charge.

..... 15

United States Code, Title 42, section 654 ..... 12a

United States Code, Title 42, section 655 ..... 10a

STATEMENT OF THE CASE

Frances Annette Pickett filed a petition (J.A. 3) to establish paternity pursuant to Tennessee Code Annotated § 36-224, alleging that Braxton Brown is the natural father of her son, Jeffrey Lee Pickett, born November 1, 1968. This petition was filed May 24, 1978. The purpose of the suit was to establish the parent-child relationship between Braxton Brown and Jeffrey Lee Pickett and to obtain child support for said child.

Braxton Brown denied paternity and moved to dismiss the petition based upon the two-year statute of limitations as set out in Tennessee Code Annotated § 36-224(2)(J.A. 18). In response to the motion to dismiss, Frances Pickett filed a motion challenging the constitutionality of Tennessee Code Annotated § 36-224(2) and moved the court to amend the petition to be brought in the name of her son (J.A. 5). The attorney general of Tennessee intervened to uphold the constitutionality of the state statute.

The parties stipulated that Jeffrey Lee Pickett was not a public charge, and that the defendant, Braxton Brown, had never acknowledged said child nor provided support.

The Honorable Kenneth A. Turner, Judge, overruled the defendant's motion to dismiss declaring said statute to be unconstitutional. The trial court found that the statute discriminated against illegitimate as opposed to legitimate children, and that the statute also discriminated against illegitimate children not a public charge as opposed to illegitimate children who are a public charge. The judge further ordered that the petition be brought in the name of the minor child by Frances Pickett as next friend. This order was entered April 24, 1980 (J.A. 13).

The state of Tennessee and the defendant appealed the trial court's ruling to the Supreme Court of Tennessee. On August 30, 1982, the Supreme Court of Tennessee entered an opinion which upheld the constitutionality of the two-year statute of limitations in non-welfare cases. The trial court's opinion was reversed, and the petition to legitimate the child was dismissed (J.A. 21).

SUMMARY OF ARGUMENT

I. The two-year statute of limitations in Tennessee's paternity statute does not bear a substantial relationship to a permissible state objective. The statute discriminates between legitimate and illegitimate children seeking support from their natural fathers. The statute also discriminates between illegitimate children receiving welfare and illegitimate children who do not receive welfare.

In Tennessee an illegitimate child receiving welfare may have his (or her) paternity established any time prior to his eighteenth birthday. A legitimate child may obtain support from its parents any time prior to its eighteenth birthday. Only the illegitimate child who is not receiving welfare is limited to two years after his birth in which time he must have a paternity suit filed or forever lose the right to paternal support.

This discrimination cannot be justified by any legitimate state interest and is thus unconstitutional.

II. Tennessee's statutory scheme in paternity cases denies appellants due process of the law. An illegitimate child not receiving welfare can lose his right to paternal support by his mother's failure to file a paternity suit within two years after the child is born. It is unjust, and a denial of due process, to place an illegitimate child's right to paternal support solely in the hands of its mother.

Statistically, mothers of illegitimate children are often young and poor. Because of social pressure or financial inability, or ignorance, she may not file a suit within the two-year period. This denies the child to a fair and reasonable opportunity to be heard concerning his paternity and support rights from his father.

A mother in Tennessee has a right to financial assistance from her child's father throughout the child's minority. Mothers of illegitimate children on welfare are protected from loss of this right; but mothers who fail to apply (or do not need to apply) for welfare are not informed of the two-year statute and thus may lose their right to assistance from the child's father.

In Tennessee the mother of a legitimate child, and the mother of an illegitimate child on welfare, cannot waive her child's right to paternal support. Only the non-welfare illegitimate child can lose this right by its mother's nonaction. This result is not supported by any rational state interest or compelling need and as such is unconstitutional.

ARGUMENT

BACKGROUND STATISTICS AND INFORMATION CONCERNING CHILDREN BORN OUT OF WEDLOCK.

A. Statistics.

Between 1961 and 1974, the rate of out-of-wedlock child-bearing increased by 75 percent among 14 to 17 year olds nationally.[1] For the country as a whole, the birth rate from 1966 to 1975 declined for all age groups other than girls between 15 to 17. The 15 to 17 year old group

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[1] "11 Million Teenagers," The Alan Guttmacher Institute, 1976, at 13.

increased their birth rate by 21.7 percent during this period of time,[2] 1966 to 1975.[3]

When enacting the 1974 amendments to Title IV of the Social Security Act[4] Congress found ". . . 3.7 million AFDC recipients today are found in families where the father is not married to the mother. It is disturbing to note that from 1971 to 1973, there has been a 21.7 percent increase in the number of AFDC families . . . in which the father was not married to the mother."[5]

Statistics for Shelby County, Tennessee, from 1972 to 1981, show a total of 49,286 illegitimate births. Of these, 19,914 illegitimate births were to teenage girls. In 1981, 58.5 percent of all non-white births were to unwed mothers. In 1981 there were 88 illegitimate births to girls under 15 and 868 illegitimate births to girls from the ages of 15 to 17.[6]

This statistical information not only shows the vast numbers of illegitimate children born in Shelby County, Tennessee, but more important, shows that a large num-

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[2] "Vital Statistics Report, Natality Statistics," Vol. 26, No. 5, September 8, 1977, National Center for Health Statistics.

[3] Every effort has been made herein to provide the most recent statistical information available. The variance in dates is not designed to mislead the reader nor has plaintiff chosen only those dates or periods of time which help her argument. Rather, the differing periods of time occur because of the varying sources from which the information was obtained, and limited resources for this data.

[4] Pub. L. 93-647; 88 Stat. 2351; 42 U.S.C. § 651 *et. seq.*

[5] 1974 U.S. Code Cong. and Adm. News, p. 8146.

[6] These figures were calculated from statistics found in the Memphis-Shelby County Health Department Annual Report for 1979 and 1981. A copy of portions of these documents is included in the appendix at pages 1-5.

ber of these illegitimate children are born to girls who are minors (under the age of 18).[7]

B. Infants Are Entitled To Special Protection Of The Law.

"From the earliest time, infants were regarded as entitled to the especial protection of the state, and the King, as 'parens patriae,' was parent in a peculiar sense, of all orphaned or dependent children within the realm." (27 Am. Jur. § 102, at 823) Now, the state acts as "parens patriae" of all the children within its jurisdiction.[8]

The public interest is heavily involved in paternity proceedings. "This is far more than just a suit between these particular parties involving private rights only. The public policy of the state is involved in any bastardy hearing." (*Tennessee Department of Human Services*,

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[7] In effect, the two-year statute of limitations contained in Tennessee Code Annotated § 36-224(2) often requires a mother to act within a period of time during which she is a legally incompetent minor. The rights of an illegitimate child are thus placed in the hands of another minor child. The right of legitimacy and support may be lost before either mother or child reaches legal majority.

[8] A thorough examination of the doctrine of "Parens Patriae" is found in "Note: The *Parens Patriae* Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers" 27 U. Pitt. L.R. 894-914. In part the Note finds that the King did not exercise the power as a parent but rather he, through the courts, exercised a "anti-parental" right. Limits were placed upon the rights of guardians to commit waste of the property of their ward.

In the case on appeal, the Tennessee Supreme Court dictates that an illegitimate child's mother should be allowed to commit a "waste" of her child's property by electing not to pursue a paternity suit within two years after the birth of her son. *Pickett* gives this right solely to the mother denying any person a right to interfere with her decision so long as the child does not become a public charge. (J.A. 34, 37, 38-39).

Assignee of Donna Rogers v. *Major Vaughn*, (Tenn. 1980) 595 S.W.2d 62, 64).

C. What Is The State's Interest With Regard To Paternity?

Chapter 186 of the Public Acts of Tennessee, 1955 begins:

> An act to provide for the establishment of paternity of a child born out of wedlock and the consequences thereof, for the support and education of a child born out of wedlock, and to provide for enforcement of support orders * * *

The public interest is twofold:

1. to ensure that the natural parents of a child do not cast their offspring upon the state for support; and,

2. to protect the minor child's legal rights to support, education, and legitimacy; to protect the child from parents whose concerns and interests are often adverse to the child's and society's as a whole.

There is a national interest involved in these cases as well. Congress has found that a child has a right to have its paternity ascertained and a right to support from its father.

> In taking the position that a child born out of wedlock has a right to have its paternity ascertained in a fair and efficient manner, the committee acknowledges that legislation must recognize the interest primarily at stake in the paternity action to be that of the child. Since the child cannot act on his own behalf in the short time after his birth, when there is hope of finding its father, the Committee feels a mechanism should be provided to ascertain the child's paternity . . .[9]

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[9] Legislative History, Social Services Amendments, 1974 U.S. Code Cong. and Adm. News, p. 8154-8155.

Tennessee's Two-Year Statute Of Limitations In Paternity Cases Violates The Equal Protection Clause Of The Fourteenth Amendment To The United States Constitution.

Under Tennessee Code Annotated § 34-101, 36-223, and 36-828, legitimate children have an on-going judicially enforceable cause of action for child support until they reach the age of eighteen. This right of support exists against both parents. The mother of a legitimate child can not by her inaction waive the statutory obligation of the child's father to this support. (*Rose Funeral Home, Inc.* v. *Julian*, 144 S.W.2d 755, 757 (Tenn. 1940)).

As this court stated in *Gomez* v. *Perez*, 409 U.S. 535 (1973):

> Once a state posits a judicially enforceable right on behalf of children to needed support from their natural fathers, there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father is not married to its mother.

409 U.S. at 538

Implicit in *Gomez* was the notion that the state must accord to an illegitimate child the right to institute a judicial proceeding for the purpose of proving the identity of a biological father in order to obtain a judicially enforceable support right otherwise accorded to legitimate children generally.

The statute at issue in this case, Tennessee Code Annotated § 36-224, provides the only method whereby an illegitimate child may establish paternity and receive child support. Section 36-224 requires that any law suit to establish paternity must be filed before the illegitimate child is two years of age (unless the child is acknowledged in writing or by the furnishing of support).

In *Matthews* v. *Lucas*, 427 U.S. 495 (1976), the court held that discrimination against illegitimate children is not subject to an equal protection "strict scrutiny" test, but also made clear that normal "rational basis" equal protection review is inappropriate. Rather, the court articulated a form of heightened scrutiny review applicable to discrimination on the basis of illegitimacy. The opinion emphasized that the standard of review applied is "not a toothless one." *Matthews* v. *Lucas*, 427 U.S. 495, 510 (1976).

The court in *Lucas* relied on a perception of the disfavored status of the legitimacy and the resulting discrimination and reaffirmed *Weber* v. *Aetna Casualty and Surety Company*, 406 U.S. 164 (1972); *Gomez* v. *Perez*, 409 U.S. 535 (1973); and *Jiminez* v. *Weinberger*, 417 U.S. 628 (1974), all of which subjected classifications based on illegitimacy to rigorous scrutiny and found them to offend the equal protection clause.

The statute in *Lucas* survived rigorous review because it granted benefits to illegitimate children who met any of several alternative criteria for entitlement. This statute was based on "reasonable impurical judgments that [were] consistent with a design to qualify entitlement" [427 U.S. at 510] and accorded illegitimate children a full opportunity to present relevant evidence. According to the majority opinion, the statute in *Lucas* did ". . . not broadly discriminate between legitimate and illegitimates without more, but [was] carefully tuned to alternative considerations." [427 U.S. at 513]. The court reaffirmed its previous statements that ". . . the legal status of illegitimacy, however defined, is like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and

contribute to society," and that imposing disabilities on innocent children simply because of their birth status remains "illogical and unjust." *Lucas*, 427 U.S. at 505.

In *Trimble* v. *Gordon*, 430 U.S. 762, 767 (1977), the court stated that "illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations [but] the analogy was not sufficient to require 'our most exacting scrutiny.' " Nevertheless, "[i]n a case like this, the equal protection clause requires more than the mere incantation of a proper state purpose." (430 U.S. at 769).

Lalli v. *Lalli*, 439 U.S. 259, 265 (1978) similarly held that classifications based on illegitimacy "are not subject to 'strict scrutiny,' [but] they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests."[10] Thus, "a statute placing exceptional burdens on illegitimate children in the furtherance of proper state objectives must be more 'carefully tuned to alternative considerations.' " *Lalli*, 439 U.S. at 266, quoting *Trimble* v. *Gordon* and *Matthews* v. *Lucas*. Further, the relation of the statutory discrimination to state interests must be "evident and substantial." *Lalli*, supra 439 U.S. at 268.

In sum, the court has upheld statutory classifications discriminating against illegitimate children only "[i]n cases where statutory classifications effecting illegitimates are so precisely structured as to further a sufficiently adequate state interest . . ." *Parham* v. *Hughes*, 441 U.S. at 347, 352 n. 5 (1979).

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[10] "Such restrictions will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest." *Mills* v. *Habluetzel* 102 S.Ct. 1549 (1982).

This court has always subjected to special scrutiny invidious discrimination against groups on the basis of the conditions of their birth or ancestry. See *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967); *Oyama* v. *California*, 332 U.S. 633, 644-646 (1948); *Hirabayashi* v. *U.S.*, 320 U.S. 81, 100 (1943).[11]

Illegitimacy subjects a child to "a stigma of inferiority and a badge of opprobrium." Note, "Developments in the Law of Equal Protection," 82 Harv. L. Rev. 1065, 1127 (1969). See also *Jimenez v. Weinberger*, 417 U.S. 628, 632 (1974); Krause, *Illegitimacy, Law and Social Policy* (1971); Krause; "Equal Protection for the Illegitimate," 65 Mich. L. Rev. 477 (1967).[12]

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[11] See also: *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). One hundred years ago this court recognized that the constitutional prohibition against forfeitures of the blood was a reaction to the "rank injustice" when "innocent children were made to suffer because of the offense of their ancestor. *Wallach* v. *Van Riswick*, 92 U.S. 202, 210 (1875). Discrimination against illegitimate children has been compared to attaching "an archaic corruption of the blood, a form of bill of attainder," *King* v. *Smith*, 392 U.S. 309, 336 n. 5 (1961), Douglas, J., concurring, and with a "badge of ignobility," violating Art. 1, § 9, Clause 8 of the Constitution, *Eskra* v. *Morton*, 524 F.2d 913 n. 8 (7th Cir. 1975).

[12] When children are stigmatized because of a condition of their birth, the stigma generates a feeling of inferiority that may inflict long term damage, as this court recognized in *Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954). Legal enforcement of the stigma should be scrutinized with particular care.

> To give the illegitimate child an inferior status because, through no fault of his own, his parents were never joined in an easily dissolved union is a hypocracy which can only frustrate and alienate him from society which created his inferiority.

Marcus, "Equal Protection: The Custody of the Illegitimate Child," 11 Journal of Family Law 1, 17-18 (1971). "Illegitimate children

Heightened scrutiny has been found necessary and appropriate by this court in enforcing the equal protection clause on behalf of these children who have suffered "through the ages society's 'illogical and unjust' condemnation," *Weber*, supra, 406 U.S. at 175.

A. Tennessee Code Annotated § 36-224(2)'s "Wealth Based" Discrimination Is A Violation Of The Fourteenth Amendment To The United States Constitution Because It Is Not Substantially Related To A Permissible State Interest.

1) THE STATUTE IS DISCRIMINATORY.

Tennessee Code Annotated § 36-224(2) reads:

> (2) Proceedings to establish the paternity of the child and to compel the father to furnish support and education for the child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the lapse of more than two (2) years from the birth of the child, unless paternity has been acknowledged by the father in writing or by the furnishing of support. Provided, however, that the Department of Human Services or any person shall be empowered to bring a suit in behalf of any child under the age of eighteen (18) who is, or is liable to become a public charge.

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become increasingly aware of their social inferior status, and show differences in adjustment, as well as lower I.Q. the differences increase with age." Jenkins, "An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children," 64 American Journal of Sociology 196 (1958).

Two classes are created by this statute. Children who are, or are likely to become[13] public charges, *versus* children who are not public charges. Both classes of children are similarly situated. That is, each class consists of children born out of wedlock. The sole determining difference is wealth or perhaps social standing.

If a child born out of wedlock is adequately supported by its mother so as to preclude the need for welfare, then its rights to legitimacy and paternal support are terminated two years after its birth. (*Pickett* v. *Brown*, 638 S.W.2d 369; J.A. 21). On the other hand, if the child born out of wedlock is less fortunate economically—thus requiring welfare—its right to legitimacy and paternal support may be enforced up to its eighteenth birthday. (*Tennessee Department of Human Services* v. *Lumley*, 638 S.W.2d 381 (Tenn. 1982).

On its face, Tennessee Code Annotated, § 36-224(2) discriminates irrationally against the unacknowledged illegitimate child whose mother is not in the public charge category before its eighteenth birthday.

This issue was squarely addressed in the case of *Wales* v. *Gallan*, 306 N.Y.S.2d 614, wherein the court held:

> * * * it is entirely irrational and arbitrary to differentiate in the right of a child to the possible benefits of a suit to establish his paternity, depending on whether the child or his mother is or is not a public charge during this first [18] years. The child's status for the rest of his life may be adversely affected on the basis that lacks rational connection with his deprivation. at 618

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[13] The clause: "likely to become a public charge" refers to an unborn child.

2) The Statute Serves No Legitimate State Interest.

There exists two purposes for the dual statute of limitations, and the one negates the other.

First, the major purpose of a statute of limitations is the protection of a respondent or defendant from stale or fraudulent claims. Second, the statute is designed to protect the public purse. A contrary result, however, is ensured.

A non-welfare mother who finds her suit blocked by the shorter statute of limitations needs only terminate her employment and place herself and her child on the public welfare roles to circumvent the two-year statute of limitations. Thus, the two-year statute of limitations has the effect of encouraging mothers of children born out of wedlock to go on welfare in order to legitimate their children. This is contrary to the statute's intended purpose and the public policy of Tennessee.

The Attorney General strenuously argues that the two-year statute of limitations is to prevent "stale and fraudulent" claims. The dual statute of limitations does not appear to serve this purpose, since the putative father remains vulnerable to a paternity suit for eighteen years if the child ever becomes a public charge. "The justification for the difference in limitations is even more doubtful considering that the paternity statute is primarily intended to 'secure the health and well being' of children." *Wales* v. *Gallan*, at 617.[14]

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[14] The statute promotes—to a degree—the prosecution of stale claims. This petition was filed when Jeffrey Lee Pickett was 9 years old. By the state's logic, the petition should be dismissed as stale. But if the child becomes a public charge next year, at age 16, the case must be tried. Logically the case should be "staler" next year than 5 years ago. The purported object sought by the state (the prevention of stale claims) is not accomplished by the present statutory scheme.

To say the application of the statute of limitations in paternity cases is justified by the state's interest in preventing stale claims is even more absurd when considered in light of Tennessee Code Annotated, section 28-1-106 which reads:

> PERSONS UNDER DISABILITY ON ACCRUAL OF RIGHT. If the person entitled to commence an action is, at the time the cause accrued, either within the age of eighteen (18) years, or of unsound mind, such person, or his representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceed three (3) years, and in that case within three (3) years from the removal of such disability.

"The legal disability statute represents a long-standing policy of the state of Tennessee to protect potential causes of actions by minors during the period of their minority." *Parlato* v. *Howe*, 470 F. Supp. 996 (E.D. Tenn. 1979). In every form of action in Tennessee other than paternity, the statute of limitations is tolled during a child's minority.

Common sense dictates that a personal injury suit brought 10 to 15 years after the event could present no greater problems of proof than a 10 or 15 year old paternity suit. The reverse is more likely, for now a purported father may avail himself of the benefits of an HLA blood test to disprove his paternity.[15]

F. The Statute More Strictly Limits The Right To Support Of Illegitimate Children Than Of Legitimate Children.

A child born out of wedlock has a right to support from his father (Tennessee Code Annotated § 36-223, *Brown* v.

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[15] See: *Little* v. *Streater*, 452 U.S. 1, 6-8 (1981); *Mills Habluetzel*, 102 S.Ct. 1549 note 4 (1982).

Thomas, (Tenn. 1968) 426 S.W.2d 496). His mother, as caretaker and natural guardian, merely serves as a proper person to receive the support benefits due and owing a child born out of lawful wedlock, and she cannot contract away the child's right or release the putative father's obligation (*Reynolds* v. *Richardson*, 483 S.W.2d 747 (Tenn. App. 1971), cert. denied, *Reynolds* v. *Tennessee*, 410 U.S. 944 (1973), modified by *Pickett* J.A. 21, at 34). A right of a child born out of wedlock to obtain support is a continuing right until the child reaches the age of eighteen years. This right may be enforced by a paternity suit under Tennessee Code Annotated § 36-222, *et. seq.*, which is both an action to determine paternity and an action for child support.

Tennessee Code Annotated § 36-224(2) imposes a two-year statute of limitations within which the right of a child born out of wedlock to parental support must be asserted, unless the child is or is about to become a public charge; but no such limitation is imposed on the support rights of a child born in wedlock who has a court enforceable right to support in Tennessee until age eighteen. By enacting this statutory limitation on the time in which paternity actions may be brought, the legislature is treating children born out of lawful wedlock differently from children born in wedlock. Because of this statute, the rights of a child born out of wedlock to support may be foreclosed forever by the failure of his mother to file a suit through her ignorance, neglect, or collusion with the father and through no fault of the child.

This differing treatment unconstitutionally discriminates between legitimate and illegitimate children. See also: (*Stringer* v. *Dudoich*, 583 P.2d 462 (N.M. 1978); *Cessna* v. *Montgomery*, 329 N.E.2d 861 (Ill. 1975), overruled by *Cessna* v. *Montgomery*, 63 Ill. 2d 71, 344 N.E.2d

447 (1976); *Florida* v. *West*, 378 So.2d 1220; (Fla. 1979); *State* v. *Wilson*, 634 P.2d 172 (Mont. 1981); *Lenoir County* v. *Johnson*, 264 S.E.2d 816 (N.C. 1980); *Palmer* v. *Mangum*, 338 So.2d 1002 (Miss. 1976); *Huss* v. *DeMott*, 524 P.2d 743 (Kan. 1974); and *Kaus* v. *Sing Chawla*, 522 P.2d 1198 (Wash. Ct. App. 1974) all of which hold that limitations on paternity suits or child support suits by illegitimates are unconstitutional in their entirety or as they apply to illegitimate children.

Tennessee's Two-Year Statute Of Limitations In Paternity Cases Denies Appellants Their Constitutionally Protected Right To Due Process.

I.

A. Children In Tennessee Have A Right To Support From Both Their Parents.

T.C.A. § 34-101. Fathers and mothers are joint natural guardians of their minor children, and they are equally and jointly charged with their care, nurture, welfare, education, and support, and also with the care, management and expenditure of their estates. * * *

T.C.A. § 36-223. The father of a child born out of wedlock is liable for the necessary support and education of the child. * * *

T.C.A. § 36-828. In a suit for annulment, divorce or separate maintenance, where the custody of a minor child or minor children is a question, the court may, notwithstanding a decree for annulment, divorce or separate maintenance is denied, award the care, custody and control of such child or children to either of the parties to the suit, or to some suitable person, as the welfare and interest of the child or children may demand, and the court may decree that suitable support be made by the natural parents or those who stand in the place of the natural parents by adoption. Such decree shall remain within the control of the

> court and be subject to such changes or modification as the exigencies of the case may require.

This obligation of support is a statutory duty owed to the child by his parents. In the event of nonsupport, the child has a legal right to sue his father, and if need be, to prove his paternity.

> T.C.A. § 36-224. A petition to establish paternity of a child, * * * and to compel the father to furnish support and education for the child, * * * may be filed by the mother, or her personal representative, or . . . * * * After the death of the mother or in case of her disability said petition may be filed by the child acting through a guardian or next friend.

In *Rose Funeral Home, Inc.* v. *Julian*, (Tenn. 1940) 144 S.W.2d 755, 756 the court held: ". . . it is logically held that such a decree [speaking of child support] relates merely to the relative rights and duties of the parent toward each other. Since the child is not a party to such suit, the child's rights as against the father are not affected." The court further held at page 757: "An agreement by the mother to perform her statutory duty does not discharge the father's statutory obligation."

In *Reynolds* v. *Richardson*, *supra*, the court allowed the child to maintain an action in its own name after finding that the mother had released her right to sue the father. Although *Reynolds* has been modified by *Pickett*, the court in *Pickett* acknowledges that a child has a right to bring a paternity suit in its own name after the mother's death or disability.

Thus, a child has a cause of action for support. It is well settled that ". . . a cause of action is a species of property protected by the Fourteenth Amendment's due process clause." *Logan* v. *Zimmerman Brush Co.* 102 S.Ct. 1148, 1154 (1982).

B. Children Have A Right To The Companionship, Care, And Management By Their Parents.

In *Lassiter* v. *Department of Social Services*, 452 U.S. 18, at 38, Mr. Justice Blackmun wrote for the dissent:

> At stake here is "the interest of a parent in the companionship, care, custody, and management of his or her children." *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972). This interest occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility. "[F]ar more precious . . . than property rights," *May* v. *Anderson*, 345 U.S. 528, 533 (1953), parental rights have been deemed to be among those essential to the orderly pursuit of happiness by free men, *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923), and to be more significant and priceless than " 'liberties which derive merely from shifting economic arrangements.' " *Stanley* v. *Illinois*, 405 U.S. at 651, quoting *Kovacs* v. *Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring). Accordingly, although the constitution is verbally silent on the specific subject of families, freedom of personal choice in matters of family life long has been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment. *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Moore* v. *East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion); *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer* v. *Nebraska*, 262 U.S. at 399. Within this general ambit of family integrity, the court has accorded a high degree of constitutional respect to a natural parent's interest both in controlling the details of the child's upbringing, *Wisconsin* v. *Yoder*, 406 U.S. 205, 232-234 (1972); *Pierce* v. *Society of Sisters*, 268 U.S. at 534-535, and in retaining the custody and companionship of the child, *Smith* v. *Organization of Foster Families*, 431 U.S. at 842-847; *Stanley* v. *Illinois*, 405 U.S. at 651.

At stake here is an illegitimate child's right to the pursuit of the happiness generally afforded "free men." That is, a family life, the bond of father and son, and a peace of mind which accompanies the knowledge that one is not a "bastard." The constitution protects as a "property right" the interests of the parents. Conversely, the child has a constitutionally protected right to have parents and to be supported and cared for by his parents.

C. Children Have A Right To Establish Their Paternity.

At this time, there exists no legal decision granting to children born out of wedlock a constitutionally protected right to establish their paternity.[16] Quite the contrary, those few rights that illegitimate children have, have been grudgingly granted only as a result of United States Supreme Court decisions within the past 15 years.[17]

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[16] "In taking the position that a child born out of wedlock has a right to have its paternity ascertained in a fair and efficient manner, the Committee acknowledges that legislation must recognize the interest primarily at stake in the paternity action to be that of the child. Since the child cannot act on his own behalf in the short time after his birth when there is hope of finding its father, the committee feels a mechanism should be provided to ascertain the child's paternity whenever it seems that this would both be possible and in the child's best interest." 1974 U.S. Code Cong. and Adm. News, p. 8155.

[17] *Levy* v. *Louisiana*, 391 U.S. 68 (1968); *Glona* v. *American Guarantee and Liability Insurance Co.*, 391 U.S. 73 (1968); *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972); *Gomez* v. *Perez*, 409 U.S. 535 (1973); *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974); *Mathews* v. *Lucas*, 427 U.S. 495 (1976); *Trimble* v. *Gordon*, 430 U.S. 762 (1977); *Lalli* v. *Lalli*, 439 U.S. 259 (1978); *Parham* v. *Hughes*, 441 U.S. 347 (1979); *Caban* v. *Mohammed*, 60 L.Ed. 297 (1979); *Mills* v. *Habluetzel*, 102 S.Ct. 1549 (1982).

As Mr. Justice Powell stated for the court in the *Weber* case: "

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent."

406 U.S., at 175.

The parents are directly responsible for introducing the child into this world; and they should be equally directly responsible to such child to provide it with care, education, and support. This concept has been accepted with regard to legitimate children, but not so with children born out of wedlock. The man is jointly responsible only if the woman files a paternity suit within two years after the birth of the child (with irrelevant exceptions for purposes of this argument).

This law, and its concept, is a blatant declaration of male supremacy, a throwback to the days when laws were made by men for men. It represents the idea that it was the woman who got pregnant and not the man so she should bear the responsibility for her act—not the man.[18] In essence, the legislature is condemning the actions of

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[18] "The enforcement of child support obligations is not an area of jurisprudence about which this country can be proud." 1974 U.S. Code Cong. and Adm. News, p. 8146-8147.

the mother while encouraging the acts of the man. Such laws no longer have a place in modern society.[19]

Mr. Justice Blackmun stated for the dissent in *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1979):

> Ours, supposedly, is "a maturing society," *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), and our notion of due process is, "perhaps, the least frozen concept of our law." *Griffin* v. *Illinois*, 351 U.S. 12, 20 (1956) (concurring opinion). If the Court in *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), was able to perceive as constitutionally necessary the access to judicial resources required to dissolve a marriage at the behest of private parties, surely it should perceive as similarly necessary the requested access to legal resources when the State itself seeks to dissolve the intimate and personal family bonds between parent and child.

The time has come to recognize the antiquity and lack of reasoning behind our laws limiting the rights of children born out of wedlock. The time has come to recognize that an illegitimate child has a constitutionally protected interest in establishing his parentage.

D. Children Have A Fair Right And Reasonable Opportunity To Be Heard On Their Right To Support And Paternity.

T.C.A. section 36-223 states that the father of a child born out of wedlock is liable for the child's support.

Pickett holds that this duty of support, and the child's right to receive this support, terminates upon the child's

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[19] As stated by the Court in *Levy* v. *Lousiana*, 391 U.S. 68, at 70-71: "We have been extremely sensitive when it comes to basic civil rights (*Skinner* v. *Oklahoma*, supra, at 541; *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 669-670) and have not hesitated to strike down invidious classification even though it had history and tradition on its side."

second birthday—if the child's mother has failed to file suit (and the exceptions do not apply). In other words, the effect of the statute is to terminate every right which the child would otherwise enjoy, through no fault of his own. The statute cuts off the rights of illegitimate children without notice or hearing procedures. As was stated in *Logan*, page 1154, this is " 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].' *Boddie* v. *Connecticut*, 401 U.S. 371, 380 (1971).[20]

E. Appellant, Frances Annette Pickett, Has A Property Interest Protected By The Fourteenth Amendment.

Ms. Pickett has two causes of action against the child's father. One is a right to seek his financial contribution toward support of the child (T.C.A. § 34-101 and § 36-223). The other is a cause of action to establish paternity afforded by T.C.A. § 36-224. As stated at page 20, a cause of action is recognized as a property interest protected by due process.

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[20] At page 1154, footnote 5 the court continues: "The Court's cases involving the right of access to courts provide an analogous method of analysis supporting our reasoning here. In *Boddie*, the Court established that, at least where interests of basic importance are involved, 'absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.' " 401 U.S. at 377.

II.

A. Tennessee's Statutory Scheme By Which Illegitimate Children Must Enforce Their Support Rights Deprives Jeffrey Lee Pickett Of His Right To Due Process Of Law Under the Fourteenth Amendment.

The Tennessee Supreme Court has found in *Pickett*, at page 23:

> Since the mother is the party primarily authorized by the statute to bring the action, and thus of necessity makes a decision which is binding on the child, we agree with those courts which have held that, for a myriad of reasons, she is the best qualified person to do so. The state has determined that the mother should be allowed to make this important decision, as it is essentially a private matter.

It is unjust and a denial of due process to place a child's right to paternal support and legitimacy in the hands of its mother. The statute of limitations as drafted allows a child's right to paternal support to terminate before the child has any real opportunity to assert it.

Permitting a child's mother to institute paternity proceedings on behalf of her offspring does not satisfy the requirements of due process because the mother's short term interests,[21] i.e., continuing fondness for the father or her reluctance publicly to reveal her indiscretion, may conflict with the child's long-term interests of support and legitimation. (*Florida* v. *West*, 378 So.2d 1220, at (1980)).

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[21] "Financial difficulties caused by child-birth expenses or a birth-related loss of income, continuing affection for the child's father, a desire to avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of an illegitimate child all encumber a mother's filing of a paternity suit . . ." *Mills* v. *Habluetzel*, 102 S.Ct. 1549 (1982). See brief of *Amici Curiae*, p. 15 n. 8.

In Kansas the court found that a minor child was not bound by the limitation of action that may apply to its mother (*Huss* v. *DeMott*, 215 Kan. 450, 524 P.2d 743). The reasoning of the court was based upon the fact that the mother's inaction or improper action in asserting a timely claim should not prejudice a minor child (at pg. 746).

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. * * * As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children" as was stated in *Bartley* v. *Kremens*, 402 F. Supp. 1039, 1047-1048 (ED Pa. 1975), vacated and remanded, 431 U.S. 119 (1977), creates a basis for caution . . . *Parham* v. *J.R.*, 442 U.S. 584, 602.

This principal is usually stated in terms of the child's "parents." In a paternity suit, the child is limited to the guidance and decision-making ability of its mother. *Parham* states that the parent usually has the maturity, experience, and capacity for judgment which the child lacks. It is true that the child will lack these qualities, but we must question whether the mother, in the context of a paternity suit, is possessed of these qualities.

Her decision to seek support (or waive it, if knowingly made) must be made within two years after the birth of a child born to her without a husband (*Pickett* J.A. 38-39). One must immediately call in to question her judgment and ability to make decisions. Logically, she will be under

severe pressures. Under these circumstances, two years is not long enough to decide whether to take the child's father to court. Statistically speaking, the mother of a child born out of wedlock is probably herself a minor at the time her child is born.

This court has held unconstitutional a Missouri statute granting parents an absolute veto over a minor child's decision to have an abortion. *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976). The same logic applies here. The child's interest in being legitimate; the child's interest in receiving the benefit of support from both his parents; the child's interest in the companionship, care and custody of his parents; these interests are so important, so basic to our American way of life, that "Due Process" can not allow the child's mother to waive these rights by her inaction or refusal to act within two years after the child's birth.

B. Tennessee's Statutory Scheme By Which Illegitimate Children Must Enforce Their Support Rights Deprives Appellants Of Their Right To A Fair And Reasonable Opportunity To Be Heard On Their Right To Support And Paternity.

Children in Tennessee have a right to support from both parents (T.C.A. § 34-101 and § 36-223). The right of legitimate children to this support is on-going (*Blackburn* v. *Blackburn*, 526 S.W.2d 463 (Tenn. 1975). That is, each day a new cause of action for support commences. The action can be commenced at birth if the parents have separated or any time prior to the child's 18th birthday. *Gomez* v. *Perez*, 409 U.S. 535 (1973) holds that if this right exists for legitimate children, then it must exist for illegitimate children.

In Tennessee however, this right terminates for the illegitimate child upon its second birthday if the child's

mother fails to act. For legitimate children, the mother's nonaction does not waive the child's rights, *Rose Funeral Home, supra.* at page 757. Ignoring the obvious equal protection question raised by this distinction, the two-year period of limitations is a denial of due process.

The statutory scheme, by which illegitimate children in Tennessee must enforce their rights to support from their natural fathers, carries with it two defects. The first is the two-year statute of limitations on paternity actions incorporated in section 36-224(2). The second is the absence of any procedure affording a reasonable opportunity for a suit to be brought on the minor's behalf within this period (or for a suitable representative of the minor, with presumptive knowledge of the limitations period and the significance of the paternity action, to decide nonetheless not to file such a suit). The result is that an illegitimate child may be barred from pursuing his paternity (and thus support) claim when there has been no constitutionally meaningful opportunity for that child or its representative to be heard on the claim. See, *Armstrong* v. *Manzo*, 380 U.S. 545 (1965).

A fundamental requirement of due process is the "opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385 (1914). "It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545 (1965). To be meaningful, that opportunity must involve at least some notice of a threatened deprivation of interests that due process protects, *Memphis Light Gas & Water Division* v. *Cratt*, 436 U.S. 1 (1978); *Goldberg* v. *Kelly*, 397 U.S. 290 (1970); *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950). The procedures governing the initiation and the conduct of any hearing must be sufficient to ensure a litigant a fair opportunity to present his claim of

entitlement (or continued entitlement) to the interests that due process protects. *Memphis Light Gas & Water Division, supra; Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Moreover, where "persons [are] forced to settle their claims of right and duty through judicial process," *Boddie* v. *Connecticutt*, 401 U.S. 371, 377 (1971), the government may be required to facilitate such individual's access to the judicial process. *Id.* (state required to pay filing fees for indigents in divorce proceedings).

Here, the opportunity the illegitimate child has to have his paternity and support claim heard simply is not "meaningful" under any understanding of that term permitted by this court's decisions. Tennessee Code Annotated § 36-224(2) states that the illegitimate child may enforce his right to support only by a paternity suit filed within two years of his birth (unless acknowledged in writing or by the furnishing of support). But the infant himself is without ability to assert this right. Tennessee requires that this right be asserted by the child's mother.

Tennessee does not give the mother notice of the consequences of failing to file such a suit within two years, even though it would be easy—by a simple notice on all birth certificates for example—for it to do so. Nor is there, in instances in which the mother is aware of the two-year statute of limitations and wishes to file suit on her child's behalf, any mechanism for ensuring that she will be able to do so.

The state, to be sure, also has an interest in securing paternal support for the illegitimate child, if only because of the possibility that if child support is not secured, the child may become a public charge. See *Dandridge* v. *Williams*, 397 U.S. 471 (1970). Indeed, Title 4-D of the

Social Security Act, 42 U.S.C. § 654(4) (1980), requires the state to "establish the paternity" of every child eligible for AFDC. For illegitimate children whose mothers apply for AFDC, there is no statute of limitations in Tennessee, see: *Tennessee Department of Human Services* v. *Lumley*, 638 S.W.2d 381 (Tenn. 1982). The problem, of course, is that there is no reasonable assurance that any individual illegitimate child will be eligible for AFDC before his eighteenth birthday, or that his mother will apply on his behalf, thus triggering the state's obligation to "establish paternity" on the child's behalf.

In sum, Tennessee has established a procedure for judicial enforcement of illegitimate children's rights to support from their natural fathers. Under that procedure, the right to support is lost without notice of the two-year statute of limitations. That procedure cannot withstand constitutional scrutiny. The opportunity to be heard "in a meaningful manner," *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965) requires more; at least where the individual whose due process rights are at stake is an infant child incapable of protecting his own interests. It requires notice of the two-year statute of limitations on paternity actions to a presumptively suitable representative of the illegitimate infant and notice that the failure to establish paternity extinguishes the support claim from its natural father. If such a notice is given, then the representative can make a knowing decision about whether to pursue the infant support claim. See *Memphis Light Gas & Water Division* v. *Cratt*, 436 U.S. 1 (1978), *Goldberg* v. *Kelly*, 397 U.S. 290 (1970). And if due process requires that there be some minimally fair procedure to ensure the effective assertion of that claim, see *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), *Boddie* v. *Connecticut*, 401 U.S. 377 (1971), it requires as well a procedure that,

unlike the one here, provides a realistic opportunity for the claim to be heard on its merits.

While the Tennessee legislature may elect not to confer a property interest in children to receive support from their parents, it may not constitutionally authorize a deprivation of such an interest, once conferred, without procedural safeguards. Once the right is conferred, the party possessing the right must be given a meaningful opportunity to exercise his right.

C. What Are The State's Rights And Interests And Legitimate Concerns?

The child's and mother's interests have been examined. There remains the problem of assessing the state's interest. That interest is two-fold:

1. to prevent stale claims; and
2. to protect the public purse.

One obvious solution to this entire problem is for the state to appoint counsel to represent the interests of every illegitimate child soon after the child's birth, if not during the pregnancy. Appointed counsel could then make an investigation and report to the court on the possibility of legitimating the child.

In Shelby County, Tennessee, this procedure is already in effect for all illegitimate children whose mothers apply for welfare assistance (AFDC). The additional increase in work would be minimal and the savings great.

The state's reply would presumably be—we have a right to avoid the cost and administrative inconvenience that might accompany such a program. Upon reflection however, this proposed solution would serve both the state's interests. First, it would prevent the litigation of

stale claims. Second, it would substantially reduce the child's future need to apply for welfare assistance. The cost of one month's welfare far exceeds the cost of appointed counsel.[22] The state's fiscal interest is thus so small when compared to the interests of the child and mother, as to be nominal.

The cost of such a program has been reduced even further by the United States Congress. 42 U.S.C. § 655 provides that the state will be reimbursed by the federal government 50 to 90 percent of the cost of setting up and maintaining a program to establish paternity and enforce child support. Congress did not intend for these services to be limited to children receiving AFDC assistance.[23]

42 U.S.C. § 654(6) provides that child support and paternity services shall be made available to persons who are not receiving welfare assistance. Again, the federal government will assist the state with the cost.[24]

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[22] The present program in Shelby County, Tennessee, began July, 1977. The program pays appointed counsel $60 for a preliminary report resulting in a consent order of paternity. If the matter is set for a hearing in the juvenile court and paternity is admitted or there is an adjudication on the merits without the intervention of a jury, counsel receives $120. If the case is concluded before a jury, counsel receives $240.

Under this program, collection of child support payments for illegitimate children has increased from $1,786,204.49 in 1977 to $4,589,771.60 in 1981; an increase far exceeding the payments to appointed counsel. (Annual Report-1981; Juvenile Court of Memphis and Shelby County, Tennessee, p. 11 (Appendix, page 8).

[23] 42 U.S.C. § 655 is set out in the appendix, page 10.

[24] 42 U.S.C. § 654 is set out in the appendix, page 12. This program is already in force in Tennessee. Appellants' present counsel was appointed by the juvenile court pursuant to this section.

The child and mother have an interest (in access to the court to prove paternity) which far exceeds the state's interest in limiting access to the court to two years after the child's birth. The solution elected by the state, announced in Tennessee Code Annotated, section 36-224 (2), is not rationally related to the state's interests, and fails to meet the standards required by "due process." Accordingly Tennessee Code Annotated, section 36-224 (2), insofar as it seeks to limit a child's right to access to a judicial forum to seek support from his father, is unconstitutional.

CONCLUSION

The foregoing considered, appellants respectfully pray that the judgment of the Supreme Court of Tennessee upholding the constitutionality of Tennessee's two-year statute of limitations, as set out in Tennessee Code Annotated, section 36-224(2), be reversed and the judgment of the Juvenile Court of Memphis and Shelby County, Tennessee, be affirmed.

Respectfully submitted,

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1981 VITAL STATISTICS SUMMARY
MEMPHIS - SHELBY COUNTY, TENNESSEE

POPULATION

The 1981 mid-year population for the Memphis-Shelby County community was estimated at 785,000, an increase of 6,000 from the 1980 figure of 779,000. The white population was estimated at 444,000 (57%) while the non-white figure was 341,000. The 1982 mid-year estimates are 443,000 (56%) - white, 348,000 - non-white, and 791,000 - total.

MIGRATION

An analysis of the 1970 and 1980 census data and the birth/death resident data for the decade of the '70s indicates a pattern of "white flight" from Shelby County and an influx of non-whites during the 10 year period. The white population had a net out-migration of 37,000, while the non-white population showed a net in-migration of 23,000 for the decade. Combined, the result was a net out-migration of 14,000 for the community for the 10 year period or 1,400 annually leaving the community.

LIVE BIRTHS

The highest total of resident live births in the last 10 years was recorded in 1981 - 13,891. White births increased from 6,057 in 1980 to 6,323 in 1981 - the highest total since 1972 - while non-white births declined for the first time in 6 years from 7,711 in 1980 to 7,568 in 1981. The white birth rate of 14.2 births per 1,000 population was the highest in 10 years, while the non-white figure of 22.2 was the lowest in the last 3 years. The overall community rate of 17.7 was unchanged from 1980. Including 3,711 non-resident births, a total of 17,602 live births occurred in Memphis & Shelby County in 1981, 302 more than in 1980.

ILLEGITIMACY

Illegitimacy declined for the first time in 8 years with 4,837 births being recorded as illegitimate in 1981, down from the

record 4,913 set in 1980. The white total of 413 in 1981 was a record high, while the non-white figure of 4,424 was a decline over 100 from the record 4,542 in 1980. The community illegitimacy per cent of 34.8 was the second highest on record matching the 1979 figure but falling below the record 35.7% set in 1930. The white per cent of 6.5% was a new record while the non-white per cent of 58.5% was the second highest on record exceeded only by the 1980 figure of 58.9%.

PREMATURITY

The per cent of babies classified as premature (weighing less than 5.5 lbs. or 2,500 gm.) topped 10% in 1981 with a community figure of 10.3%. The 1980 figure, was 9.6%. The white prematurity per cent of 5.9% exceeded the 1980 figure of 5.3%, and the non-white, figure of 14.0% was also higher than the 1980 figure of 13.1%.

AGES OF MOTHERS

Over 2,500 new mothers in 1981 were teenagers (2,536 - 18%); almost 1,100 (1,094 - 8%) were under 18 years of age. 10% of the white mothers were teenagers, while 15% of the non-white babies were born to teenage mothers. 39% of the illegitimate babies had teenage mothers. Only 7% of the legitimate babies had teenage mothers.

INFANT MORTALITY

The number of infant deaths (under 1 year of age) in the community declined in 1981 from 223 in 1980 to 221. This slight decrease, combined with an increase in total births, resulted in a reduction in the overall infant mortality rate from the figure of 16.2 in 1980 to 15.9 infant deaths per 1,000 live births recorded in 1981, the fourth lowest rate on record. The record, 14.8, was recorded in 1978. The white infant mortality rate of 7.9 was a record low. The non-white rate of 22.6 was the highest rate since 1974.

DEATHS

Approximately 200 fewer resident deaths occurred in Memphis and Shelby County in 1981 (6,424) than in 1980 (6,628). The community death rate fell from 8.5 deaths per 1,000 population in 1980 to 8.2, the fourth lowest rate on record. White deaths increased from 3,508 to 3,592, while non-white deaths dropped almost 300 deaths from the record 3,120 in 1980 to 2,832 in 1981. The white death rate rose from 7.9 to 8.1 while the non-white rate tied the record low figure of 8.3 set in 1978; the 1980 non-white rate was 9.3. With 2,211 non-resident deaths, a total of 8,635 deaths occurred in Shelby County in 1981.

TEN LEADING CAUSES OF DEATHS

Diseases of the heart (2,429 - 37.8%), cancer (1,260 - 19.6%), and stroke (551 - 8.6%), continued to be the leading causes of death in Shelby County in 1981 and accounted fro 2/3 of all resident deaths. The other leading causes were (4.) respiratory diseases (471), (5.) accidents (179), (6.) circulatory system diseases (176), (7.) digestive system diseases (170), (8.) homicides (145), (9.) urinary system diseases (138), and (10.) certain perinatal conditions (125).

Prepared by:

Memphis & Shelby County
Health Department

3/8/82

BIRTHS TO TEENAGE MOTHERS, 1977-1981*
MEMPHIS-SHELBY COUNTY, TN RESIDENTS

YEAR	AGE 15-19 POP.	BIRTHS IN AGE GROUP	% OF TOTAL BIRTHS	FERTILITY RATE**
1977	39,400	2,704	20.9	6.86
1978	38,500	2,740	20.9	7.12
1979	37,700	2,800	20.2	7.42
1980	36,800	2,616	19.0	7.11
1981	35,400	2,448	17.6	6.92
1982	34,300			

*Excludes Under Age 15 pregnancies (annual average = 98)
**Rate per 100 women age 15-19

BIRTHS TO MOTHERS AGE 20-44, 1977-1981
MEMPHIS-SHELBY COUNTY, TN RESIDENTS

YEAR	AGE 20-44 POP.	BIRTHS IN AGE GROUP	% OF TOTAL BIRTHS	FERTILITY RATE*
1977	144,000	10,084	78.3	7.00
1978	148,000	10,257	78.3	6.93
1979	152,000	10,964	79.0	7.21
1980	156,000	11,051	80.3	7.08
1981	159,000	11,353	81.8	7.14
1982	163,000			

*Rate per 100 women age 20-44

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1981 RESIDENT LIVE BIRTHS
BY RACE, AGE OF MOTHER, AND LEGITIMACY STATUS

Age of Mother	*WHITE*			*NON-WHITE*			*TOTAL*			
	Legit	*Illeg.*	*Total*	*Legit*	*Illeg.*	*Total*	*Legit*	*Illeg.*	*Total*	*%*
Under 15	0	5	5	0	83	83	0	88	88	0.6
15-17	104	73	177	34	795	829	138	868	1,006	7.2
18-19	350	66	416	166	860	1,026	516	926	1,442	10.4
Teenage Totals	454	144	598	200	1,738	1,938	654	1,882	2,536	18.2
20-39	5,429	269	5,698	2,914	2,672	5,586	8,343	2,941	11,284	81.3
40-44	27	0	27	29	13	42	56	13	69	0.5
45 +	0	0	0	1	1	2	1	1	2	0.0
TOTAL	5,910	413	6,323	3,144	4,424	7,568	9,054	4,837	13,891	100.0

RESIDENT LIVE BIRTHS: 1979-1981
BY RACE, AGE OF MOTHER, AND LEGITIMACY STATUS

	LEGITIMATE			*ILLEGITIMATE*			*TOTALS*		
WHITE	*1979*	*1980*	*1981*	*1979*	*1980*	*1981*	*1979*	*1980*	*1981*
Under 15 Yrs.	1	3	0	9	3	5	10	6	5
15-17	152	121	104	71	60	73	223	181	177
18-19	371	395	350	70	76	66	441	471	416
Teenage Total	524	519	454	150	136	144	674	658	598
20+	5,278	5,167	5,456	212	232	269	5,490	5,399	5,725
TOTALS	5,802	5,686	5,910	362	371	413	6,164	6,057	6,323
NON-WHITE									
Under 15 Yrs.	2	0	0	93	91	83	95	91	83
15-17	74	31	34	927	886	795	1,001	917	829
18-19	226	171	166	909	876	860	1,135	1,047	1,026
Teenage Total	302	202	200	1,929	1,853	1,738	2,231	2,055	1,938
20+	2,936	2,967	2,944	2,543	2,689	2,686	5,479	5,656	5,630
TOTALS	3,238	3,169	3,144	4,472	4,542	4,424	7,710	7,711	7,568
TOTALS									
Under 15 Yrs.	3	3	0	102	94	88	105	97	88
15-17	226	152	138	998	946	868	1,224	1,098	1,006
18-19	597	566	516	979	952	926	1,576	1,518	1,442
Teenage Total	826	721	654	2,079	1,992	1,882	2,905	2,713	2,536
20+	8,214	8,134	8,400	2,755	2,921	2,955	10,969	11,055	11,355
TOTALS	9,040	8,855	9,054	4,834	4,913	4,837	13,874	13,768	13,891

42 U.S.C. § 655

§ 655. Payments to States

(a) From the sums appropriated therefor, the Secretary shall pay to each State for each quarter, beginning with the quarter commencing July 1, 1975, an amount—

(1) equal to 75 percent of the total amounts expended by such State during such quarter for the operation of the plan approved under section 654 of this title,

(2) equal to 50 percent of the total amounts expended by such State during such quarter for the operation of a plan which meets the conditions of section 654 of this title except as is provided by a waiver by the Secretary which is granted pursuant to specific authority set forth in the law, and

(3) equal to 20 percent (rather than the percent specified in clause (1) or (2)) of so much of the sums expended during such quarter as are attributable to the planning, design, development, installation or enhancement of an automatic data processing and information retrieval system which the Secretary finds meets the requirements specified in section 654(16) of this title;

except that no amount shall be paid to any State on account of amounts expended to carry out an agreement which it has entered into pursuant to section 663 of this title.

(b)(1) Prior to the beginning of each quarter, the Secretary shall estimate the amount to which a State will be entitled under subsection (a) of this section for such quarter, such estimates to be based on (A) a report filed by the State containing its estimate of the total sum to be expended in such quarter in accordance with the provisions of such subsection, and stating the amount appropriated or made available by the State and its political subdivisions for such expenditures in such quarter, and if such amount is less than the State's proportionate share of the total sum of such estimated expenditures, the source or sources from which the difference is expected to be derived, and (B) such other investigation as the Secretary may find necessary.

(2) Subject to subsection (d) of this section, the Secretary shall then pay, in such installments as he may determine, to the State the amount so estimated, reduced or increased to the extent of any overpayment or underpayment which the Secretary determines was made under this section to such State for any prior quarter and with respect to which adjustment has not already been made under this subsection.

(3) Upon the making of any estimate by the Secretary under this subsection, any appropriations available for payments under this section shall be deemed obligated.

(c)(1) Subject to paragraph (2), there shall be included, in determining amounts expended by a State during any quarter for the operation of the plan approved under section 654 of this title, so much of the expenditures of courts of such State and its political subdivisions (excluding expenditures for or in connection with judges and other individuals making judicial determinations, but not excluding expenditures for or in connection with their administrative and support personnel) as are attributable to the performance of services which are directly related to, and clearly identifiable with, the operation of such plan.

(2) The aggregate amount of the expenditures which are included pursuant to paragraph (1) for the quarters in any calendar year shall be reduced (but not below zero) by the total amount of expenditures described in paragraph (1) which were made by the State for the 12-month period beginning January 1, 1978.

(3) The State agency may, if the law (or procedures established thereunder) of the State so provides, pay so much of the amount it receives under subsection (a) of this section for any quarter as is payable by reason of the provisions of this subsection directly to the courts of the State (or political subdivisions thereof) furnishing the services on account of which the payment is payable.

(d) Notwithstanding any other provision of law, no amount shall be paid to any State under this section for any quarter, prior to the close of such quarter, unless for the period consisting of all prior quarters for which payment is authorized to be made to such State under subsection (a) of this section, there shall have been submitted by the State to the Secretary, with respect to each quarter in such period (other than the last two quarters in such period), a full and complete report (in such form and manner and containing such information as the Secretary shall prescribe or require) as to the amount of child support collected and disbursed and all expenditures with respect to which payment is authorized under subsection (a) of this section.

42 U.S.C. § 654

§ 654. State plan for child and spousal support

A State plan for child and spousal support must—

(1) provide that it shall be in effect in all political subdivisions of the State;

(2) provide for financial participation by the State;

(3) provide for the establishment or designation of a single and separate organizational unit, which meets such staffing and organizational requirements as the Secretary may by regulation prescribe, within the State to administer the plan;

(4) provide that such state will undertake—

(A) in the case of a child born out of wedlock with respect to whom an assignment under section 602(a)(26) of this title is effective, to establish the paternity of such child, unless the agency administering the plan of the State under part A of this subchapter determines in accordance with the standards prescribed by the Secretary pursuant to section 602(a)(26)(B) of this title that it is against the best interests of the child to do so, and

(B) in the case of any child with respect to whom such assignment is effective, to secure support for such child from his parent (or from any other person legally liable

for such support) and, at the option of the State, from such parent for his spouse (or former spouse) receiving aid to families with dependent children (but only if a support obligation has been established with respect to such spouse), utilizing any reciprocal arrangements adopted with other States (unless the agency administering the plan of the State under part A of this subchapter determines in accordance with the standards prescribed by the Secretary pursuant to section 602(a)(26)(B) of this title that it is against the best interests of the child to do so), except that when such arrangements and other means have proven ineffective, the State may utilize the Federal courts to obtain or enforce court orders for support;

(5) provide that, in any case in which support payments are collected for an individual with respect to whom an assignment under section 602(a)(26) of this title is effective, such payments shall be made to the State for distribution pursuant to section 657 of this title and shall not be paid directly to the family except that this paragraph shall not apply to such payments (except as provided in section 657(c) of this title) for any month in which the amount collected is sufficient to make such family ineligible for assistance under the State plan approved under part A of this subchapter;

(6) provide that (A) the child support collection or paternity determination services established under the plan shall be made available to any individual not otherwise eligible for such services upon application filed by such individual with the State, (B) an application fee for furnishing services under the State plan (other than collection of support) may be imposed, except that the amount of any such application fee shall be reasonable, as determined under regulations of the Secretary, (C) the State will retain, but only if it is the State which makes the collection, the fee imposed under State law as required under paragraph (19);

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No. 82-5576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JEFFREY LEE PICKETT, by next friend,
FRANCES ANNETTE PICKETT, and
FRANCES ANNETTE PICKETT,
Appellants,

v.

BRAXTON BROWN,
Appellee,

and

WILLIAM M. LEECH, JR.,
Intervenor-Appellee.

Appeal From The Supreme Court of Tennessee

APPELLEE'S BRIEF ON THE MERITS

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COURT CLERK'S OFFICE
JANUARY THROUGH DECEMBER — 1977 THROUGH 1981
CHILD SUPPORT COLLECTIONS

NON-SUPPORT	*1977*	*1978*	*1979*	*1980*	*1981*
JANUARY	$ 146,365.89	$ 213,296.18	$ 265,228.65	$ 312,516.64	$ 329,920.31
FEBRUARY	149,399.83	208,512.80	286,233.56	288,688.26	309,278.44
MARCH	210,725.41	273,536.43	286,038.78	302,953.93	338,318.23
APRIL	212,850.48	253,203.33	265,372.70	309,801.70	354,763.72
MAY	212,264.00	261,265.14	268,730.87	304,412.00	303,223.13
JUNE	234,492.50	258,707.92	285,860.51	298,049.99	349,327.12
JULY	205,418.10	221,568.23	281,935.99	316,783.30	325,154.14
AUGUST	227,118.11	273,539.27	308,345.29	284,519.91	326,015.56
SEPTEMBER	218,899.36	239,696.05	274,775.95	315,676.85	356,947.67
OCTOBER	242,297.50	275,741.11	318,505.18	346,024.10	333,597.61
NOVEMBER	247,064.84	252,703.79	286,357.92	276,975.65	351,675.27
DECEMBER	216,577.25	237,074.49	283,643.66	311,127.16	444,222.82
TOTAL	$2,523.473.27	$2,968,844.74	$3,411,029.06	$3,667,529.49	$4,122,444.02

COURT CLERK'S OFFICE
JANUARY THROUGH DECEMBER — 1977 THROUGH 1981
CHILD SUPPORT COLLECTIONS

PATERNITY	*1977*	*1978*	*1979*	*1980*	*1981*
JANUARY	$ 104,214.01	$ 174,292.01	$ 256,584.28	$ 306,558.86	$ 374,244.48
FEBRUARY	110,756.71	174,027.79	256,511.09	284,516.08	359,559.01
MARCH	146,495.11	230,629.38	273,465.41	314,692.72	385,553.81
APRIL	133,293.93	226,390.76	246,904.69	316,613.76	397,003.00
MAY	132,726.28	229,181.56	267,750.73	334,000.32	324,098.52
JUNE	151,231.03	246,365.34	277,014.01	312,044.45	386,798.70
JULY	139,344.89	225,394.38	274,034.15	324,660.37	351,691.61
AUGUST	162,342.18	235,344.78	290,936.40	297,330.48	360,369.41
SEPTEMBER	152,081.97	227,911.43	266,963.71	333,990.05	397,616.46
OCTOBER	185,493.88	267,748.06	327,108.65	368,792.51	377,711.32
NOVEMBER	200,724.57	239,713.23	280,073.45	315,255.79	376,819.08
DECEMBER	167,499.93	218,583.88	269,478.98	337,840.17	498,306.20
TOTAL	$1,786,204.49	$2,694,582.60	$3,286,825.55	$3,846,295.56	$4,589,771.60

COURT CLERK'S OFFICE
JANUARY THROUGH DECEMBER — 1977 THROUGH 1981
CHILD SUPPORT COLLECTIONS

DEPENDENCY	*1977*	*1978*	*1979*	*1980*	*1981*
JANUARY	$ 8,596.12	$ 7,984.59	$ 6,655.00	$ 7,324.45	$ 7,629.30
FEBRUARY	8,745.00	8,288.67	6,397.40	6,475.45	7,378.50
MARCH	10,507.50	10,599.00	6,431.50	7,776.83	7,112.84
APRIL	9,417.12	7,565.00	6,512.91	7,152.26	7,859.66
MAY	8,834.50	7,674.50	6,763.50	7,521.00	7,701.00
JUNE	7,868.50	7,012.50	7,194.50	7,019.97	7,080.00
JULY	8,232.04	5,199.17	6,330.50	9,173.06	7,345.00
AUGUST	9,162.79	6,993.50	7,046.67	7,328.91	7,979.50
SEPTEMBER	8,159.69	6,179.00	6,871.50	6,625.00	8,209.46
OCTOBER	9,514.50	6,266.66	7,634.00	7,425.75	7,643.08
NOVEMBER	8,571.62	6,207.51	7,855.50	6,813.50	9,683.35
DECEMBER	8,934.50	8,335.11	7,990.31	6,997.83	11,799.80
TOTAL	$106,543.88	$88,405.21	$83,683.29	$87,634.01	$97,421.49

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No. 82-5576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JEFFREY LEE PICKETT, by next friend,
FRANCES ANNETTE PICKETT, and
FRANCES ANNETTE PICKETT,
Appellants,

v.

BRAXTON BROWN,
Appellee,

and

WILLIAM M. LEECH, JR.,
Intervenor-Appellee.

Appeal From The Supreme Court of Tennessee

APPELLEE'S BRIEF ON THE MERITS

STATUTES INVOLVED

Tennessee Code Annotated, section 28-1-106:

> PERSONS UNDER DISABILITY ON ACCRUAL OF RIGHT. — If the person entitled to commence an action is, at the time the cause of action accrued, either within the age of eighteen (18) years, or of unsound mind, such person, or his representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceed three (3) years, and in that case within three (3) years from the removal of such disability.

Tennessee Code Annotated, section 34-101:

FATHERS AND MOTHERS JOINT AND EQUAL NATURAL GUARDIANS OF MINOR CHILDREN — EQUALLY CHARGED WITH SUPPORT AND OTHER DUTIES. — Fathers and mothers are joint natural guardians of their minor children, and they are equally and jointly charged with their care, nurture, welfare, education, and support, and also with the care, management and expenditure of their estates. Fathers and mothers have equal powers, rights, and duties with respect to the custody of their minor child or children, and the control and the services and earnings of such minor child or children; provided, that so much as may be necessary of the net income of such minor child may be expended in his care, maintenance and education.

Tennessee Code Annotated, section 36-223:

LIABILITY OF FATHER OF CHILD BORN OUT OF WEDLOCK. — The father of a child born out of wedlock is liable for the necessary support and education of the child. He is also liabile for the child's funeral expenses. He is liable to pay for the expenses of the mother's confinement and recovery, and is also liable to pay such expenses, including counsel fees, in connection with her pregnancy as the court in its discretion may deem proper.

Tennessee Code Annotated, section 36-224:

PETITION TO ESTABLISH PATERNITY — TIME OF FILING — JURISDICTION — ISSUANCE OF WARRANT. — (1) A petition to establish paternity of a child, to change the name of the child if it is desired, and to compel the father to furnish support and education for the child in accordance with this chapter may be filed by the mother, or her personal representative, or, if the child is likely to become a public charge by the state department of

human services or by any person. Said petition may be filed in the county where the mother or child resides or is found or in the county where the putative father resides or is found. The fact that the child was born outside this state shall not be a bar to filing a petition against the putative father. After the death of the mother or in case of her disability said petition may be filed by the child acting through a guardian or next friend.

(2) Proceedings to establish the paternity of the child and to compel the father to furnish support and education for the child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the lapse of more than two (2) years from the birth of the child, unless paternity has been acknowledged by the father in writing or by the furnishing of support. Provided, however, that the department of human services or any person shall be empowered to bring a suit in behalf of any child under the age of eighteen (18) who is, or is liable to become a public charge.

(3) For the purpose of this chapter original and exclusive jurisdiction is conferred upon the juvenile court.

(4) The petition shall be verified by affidavit and shall charge the person named as defendant with being the father of the child and shall demand that he be brought before the court to answer the charge.

(5) The court shall issue a warrant for the apprehension of the defendant, directed to any officer in the state authorized to execute warrants, commanding him without delay to apprehend the alleged father and bring him before the court, for the purpose of having an adjudication as to the paternity of the child, and such warrant may be issued to any county of this state. But in the discretion of the court, a summons may be issued as in civil cases.

STATEMENT OF CASE

Statement of Case as presented in Appellant's Brief is adopted by Appellee.

SUMMARY OF ARGUMENT

A. Tennessee's paternity statute which requires that actions to establish paternity and the obligation of support be instituted within two years of the birth of the child, unless paternity has been acknowledged by the father in writing or by the furnishing of support, does not invidiously discriminate against an illegitimate child's right to establish support. The two-year limitation on certain actions to establish paternity and support on behalf of illegitimate children represents a legitimate exercise of legislative authority which is rationally and substantially related to the State's legitimate interests in avoiding the prosecution of stale and fraudulent paternity actions. Further, the two-year limitation upon certain paternity actions is sufficiently long in duration to afford persons wishing to assert legitimate claims a reasonable opportunity to assert said claims. Tennessee's paternity statute also furthers the State's legitimate interests in protecting society from the burden of supporting children by allowing actions to be instituted at any time, by the Department of Human Services or any person, on behalf of any child under the age of eighteen who is or is liable to become a public charge.

Under Tennessee law legitimate and illegitimate children are afforded the same right to paternal support. T.C.A. § 34-101 and T.C.A. § 36-223. To establish the duty of support, where there is no prior acknowledgement of paternity, paternity must be established within two years after the birth of the minor child. T.C.A. § 36-224(2).

Two years following the birth of a child born out of wedlock is sufficiently long in duration to allow a mother or one acting in her place to logically and realistically assess her circumstances and presents a reasonable opportunity for those with an interest

in such children to assert claims on their behalf. The Tennessee legislature could rationally determine that within two years the mother could sufficiently recover from the financial difficulties and emotional strain and confusion which often attend the birth of an illegitimate child. If the mother suffers from a disability by virtue of her minority, the statute of limitations is tolled until the disability is removed. T.C.A. § 28-1-106. Further, a minor child has the right to maintain the action through a guardian or next friend in the event of the mother's death or disability. *See* T.C.A. § 36-224(1). Appellant's argument cites no authority to the contrary.

Further, Tennessee's paternity statute is "carefully tuned" to avoid hardship in predictable groups of cases. T.C.A. § 36-224(2) exempts those actions where paternity has been acknowledged by the father in writing or by the furnishing of support from the two-year limitation period. These exceptions are designed to avoid problems associated with the "practical obstacles" to filing paternity actions within the statutory limitation period.

Thus, appellee submits there are several factors which distinguish Texas' and Tennessee's paternity statutes. Under Texas law only fathers against whom paternity has been established have the same duty of support owed to legitimate children. By statute in Tennessee fathers of children born out of wedlock have a duty to provide support. T.C.A. § 36-223. If a putative father has acknowledged paternity in writing or provided support or if the child is subject to become a public charge, Tennesee law allows actions for support to be brought at any time until the minor child is eighteen. T.C.A. § 36-224. Thus, under Tennessee law the right to paternal support afforded children born out of wedlock is not "illusory". Tennessee law provides persons with legitimate claims a reasonable opportunity to establish the support obligation. Tennessee's two-year statute of limitations as compared to the Texas one-year statute of limitation is sufficiently long to avoid obvious personal family and

financial circumstances which often surround the birth of a child. *See Mills,* 102 S.Ct. at 1555. Tennessee's two-year limitation upon actions to establish paternity does not restrict the right to establish the obligation of support as effectively to extinguish it.

It is appellant's duty to prove that the two-year statute of limitations does not rest upon a reasonable basis and is essentially arbitrary. Absent such a showing, the presumption of constitutionality requires that the validity of the statute be upheld. *Parham* v. *Hughes,* 99 S.Ct. 1742, 1746, 441 U.S. 351, 60 L.Ed.2d 269 (1979).

The two-year statute of limitation applicable to appellant's claim is substantially related to the State's interests in avoiding litigation of stale or fraudulent claims. The two-year limitation represents a balance between the right of a mother and child to assert a claim of paternity, the right of a putative father to have the action litigated while proof is relatively fresh and evidence is still available and the interests of the state in the prompt adjudication of paternity claims. Because a father's obligation of support is ubiquitous it is in the best interests of all parties to have claims of paternity and support litigated promptly.

Tennessee's statutory scheme which views actions of paternity as civil in nature compel a two-year statute of limitation. A mother bringing an action to establish paternity will prevail if she can prove her claim by a preponderance of the evidence. *Frazier* v. *McFerren,* 55 Tenn. App. 431, 402 S.W.2d 467 (1964). The state's interests in preserving the integrity of the judicial process requires a statute of limitations which demands that paternity actions be prosecuted while proof is relatively fresh and available.

The availability of HLA test results does not negate the threat of inaccurate determinations in paternity actions. Defendants who are not excluded by blood test results are required to rely upon more conventional forms of proof which are greatly

diminished with the passage of time. *Mills* v. *Hableutzel,* 456 U.S. ____, 102 S.Ct. 1549, 1554, 71 L.Ed.2d 770 (1982) n. 4. Further, a defendant may not be able to afford the expense of HLA tests.

The problems of proof in paternity actions have been consistently recognized by this Court. *Parham* v. *Hughes, supra; Lalli* v. *Lalli,* 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978); *Trimble* v. *Gordon,* 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977); *Gomez* v. *Perez,* 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973); *Mills* v. *Hableutzel, supra.* The high risk of inaccurate findings in paternity proceedings compel the imposition of a two-year limitation upon those actions in which there is a greater likelihood of problems of proof. *See Cessna* v. *Montgomery,* 63 Ill.2d 71, 344 N.E.2d 417, 453 (1976).

The statutory classification between illegitimates who are supported from private sources and those who rely upon public funds for assistance is reasonable legislation which is based upon the State's interests in protecting public funds. The provision of T.C.A. § 36-224(2) which authorizes the Department of Human Services or any person to bring an action, at any time, on behalf of a child under the age of eighteen, who is or is liable to become a public charge, furthers the State's legitimate interests in protecting public revenues by seeking to avoid the burden of supporting minor children. *See Tennessee Department of Human Services* v. *Lumley,* 638 S.W.2d 381 (1982). Further, allowing a longer period within which an action on behalf of children who are supported by public funds to establish the obligation of support merely recognizes that such claims cannot be said to commence at any given age during the child's minority.

By allowing actions to establish paternity on behalf of children who rely upon public assistance to be brought at any time until the child reaches eighteen years of age, the State seeks to establish the duty of support during the period within which

the obligation exists. Thus, this classification clearly furthers legitimate state interests by seeking to place the responsibility of support of minor children on at least one person who is responsible for the obligation.

B. Tennessee's paternity statute does not violate principles of due process. The two-year statute of limitation is reasonable legislation which affords persons with legitimate claims a reasonable opportunity to assert them. The legislature could reasonably conclude that on balance the mother and society's interests in asserting claims of support are not great enough to outweigh the high risk of inaccurate findings in paternity proceedings. *Pickett* v. *Brown,* JA, p. 37.

T.C.A. § 36-224, which authorizes the mother or one acting in her place to assert claims of paternity and support, is rational legislation which is consistent with this nation's strong tradition of parental control in matters which are of a private nature. *See Parham* v. *J.R.,* 422 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1978); *Wisconsin* v. *Yoder,* 92 S.Ct. 1526, 406 U.S. 205, 32 L.ED.2d 15 (1972). The legislative determination which places this right of action in a mother rather than the child does not constitute a violation of due process. Pursuant to T.C.A. § 36-224(1) a minor child has the right to bring an action to establish paternity and the obligation of support only in the event of the death or disability of the mother. This action may be brought by the child through a guardian or next friend.

Assertions of procedural due process violations are inapplicable to appellant's claim. Legislative determinations limiting actions are constitutionally valid if based upon rationality.

Thus, appellee respectfully submits that Tennessee's paternity statute is not violative of principles of equal protection or due process. The two-year statute of limitations upon paternity actions is sufficiently long in duration to afford a reasonable opportunity for those with an interest to assert claims of paternity. The time limitation is substantially related to the State's in-

terests in avoiding the litigation of stale or fraudulent claims. Further, Tennessee's paternity statute represents a reasonable exercise of legislative authority which has a reasonable basis.

Appellant has failed in showing that Tennessee's paternity statute is violative of the Equal Protection and Due Process Clause of the Fourteenth Amendment. The presumption of constitutionality which is afforded this legislation requires this Court to uphold the validity of this statute.

Accordingly, the decision of the Tennessee Supreme Court should be affirmed and appellant's appeal dismissed.

ARGUMENT

1. Tennessee's Two-Year Statute Of Limitations Is Substantially Related To The State's Interests In Protecting The Fair And Efficient Operation Of The Judicial Process By Avoiding The Prosecution Of Stale Or Fraudulent Claims And Affords A Reasonable Time Within Which Claims Of Paternity May Be Asserted.

Under Tennessee law legitimate and illegitimate children are afforded an equal right to paternal support. T.C.A. § 34-101 provides with regard to obligations of parents:

> Fathers and mothers are joint natural guardians of their minor children, and they are equally and jointly charged with their care, nuture, welfare, education, and support, and also with the care, management and expenditures of their estates. . . .

T.C.A. § 36-223 provides with regard to the responsibility of fathers of children born out of wedlock:

> The father of a child born out of wedlock is liable for the necessary support and education of the child. . . .

Actions on behalf of illegitimate children to establish paternity and the obligation of support are brought pursuant to T.C.A. § 36-224. T.C.A. § 36-224 provides in pertinent part:

> (1) A petition to establish paternity of a child, to change the name of a child if it is desired, and to compel the father to furnish support and education for the child . . . may be filed by the mother, or her personal representative, or, if the child is likely to become a public charge by the State Department of Human Services or by any person. . . . After the death of the mother or in case of her disability said petition may be filed by the child acting through a guardian or next friend.

> (2) Proceedings to establish the paternity of the child and to compel the father to furnish support and education for the child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the lapse of more than two (2) years after the birth of the child, unless paternity has been acknowledged by the father in writing or by the furnishing of support. Provided, however, that the Department of Human Services of any person shall be empowered to bring a suit in behalf of any child under the age of eighteen (18) who is, or is liable to become a public charge. . . .

Appellant has challenged the constitutionality of the Tennessee two-year statute of limitations in paternity actions as being violative of due process and equal protection. Tennessee responds that the paternity statute and the applicable statute of limitations represent a reasonable exercise of legislative power which is substantially related to the State's legitimate interests in avoiding prosecution of stale and fraudulent claims.

Paternity actions are fraught with particularly troublesome problems of proof. *See Gomez* v. *Perez,* 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973); *Trimble* v. *Gordon,* 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977); *Lalli* v. *Lalli,* 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978); *Parham* v. *Hughes,* 99 S.Ct. 1742, 441 U.S. 351, 60 L.Ed.2d 269 (1979); *Mills* v. *Hableutzel,* 456 U.S. ____, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982); *Thompson* v. *Thompson,* 404 A.2d 269 (1979); *Cessna* v. *Montgomery,* 63 Ill.2d 71, 344 N.E.2d 497 (1976). In support suits by illegitimate children the State has an interest in perpetuating the fair and efficient operation of the judicial process. *See Mills, supra; Jimenez* v. *Weinberger,* 417 U.S. 628, 94 S.Ct. 2496, 481 L.Ed.2d 363 (1974). Statutes of limitations in paternity actions further the state's interest in the fair and efficient operation of the judicial process by avoiding the prosecution of stale and fraudulent claims. In *Gomez,* this Court recognized the lurking

problems of proof with regard to paternity actions. As this Court has stated these problems cannot be "lightly brushed aside". *Gomez* v. *Perez,* 409 U.S. 535, 538 (1973).

T.C.A. § 36-224(2) does not pose the "impenetrable barrier" which was held violative of the Fourteenth Amendment in *Gomez.* Nor does it so restrict the right of an illegitimate child to support as to effectively extinguish the right as did the Texas statute which was reviewed by this Court in *Mills.* The Tennessee statute affords persons bringing an action on behalf of an illegitimate child a reasonable opportunity to establish paternity and the obligation of support.

Tennessee's two-year statute of limitations represents a legislative effort to balance competing interests in paternity adjudications. By imposing a two-year statute of limitations in paternity actions the legislature has sought to balance the interests of the mother and child against the interests of the putative father and the public interest in prompt litigation of paternity claims.

Appellant asserts that because no statute of limitations exists for legitimate children seeking to enforce child support, the Tennessee two-year statute of limitations invidiously discriminates against illegitimate children. This Court has never held that legitimate and illegitimate children could not be treated differently. *Labine* v. *Vincent,* 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971); *Mills* v. *Hableutzel,* 102 S.Ct. 1549, 1554. To the contrary, in *Mills* the Court has stated "in support suits by illegitimate children more than in support suits by legitimate children, the state has an interest in preventing the prosecution of stale or fraudulent claims and may impose greater restrictions on the former than it imposes on the latter". *Mills,* 102 S.Ct. 1549, 1554.

The issues before this Court in *Mills* are similar to those presented by this appeal. However, the statutory scheme in Ten-

nesee is different than the Texas scheme and the distinctions require that the constitutionality of Tennessee's two-year limitation be upheld.

The Tennessee statute establishing the father's duty to support children born out of wedlock was enacted in 1955. T.C.A. § 36-223. Prior to this Court's decision in *Gomez* in 1973, Texas recognized no enforceable duty requiring natural fathers to support illegitimate children. The Tennessee statute is not a judicially required legislative reaction. Tennessee has almost thirty years of statutory precedent establishing the duty of a father to support a minor child born out of Wedlock. Likewise, the Tennessee legislature in 1955 established procedures for paternity in support actions on behalf of illegitimate children. T.C.A. § 36-224.

Unlike the Texas system, establishment of paternity is not the necessary first step in all suits by illegitimate children for support. An action seeking to establish the obligation of support on behalf of a minor child, who does not fall within the exceptions of T.C.A. § 36-224(2), must be brought within two years following the birth of the child. Thus, in actions to establish the obligation of support which do not fall within the exceptions of § 36-224(2) the duty of support must first be established. The father's duty to support a child born out of wedlock may be imposed at any time pursuant to T.C.A. § 36-223, notwithstanding the lack of a prior adjudication of paternity. *Smith* v. *Pruett,* 506 F.Supp. 135 (1980); *Shelly* v. *Central Woodwork, Inc.,* 207 Tenn. 411, 340 S.W.2d 896 (1960); *Brown* v. *Thomas,* 426 S.W.2d 499 (1968); *Smelcer* v. *Broyles,* 225 Tenn. 187, 465 S.W.2d 355 (1971); *Reynolds* v. *Richardson,* 483 S.W.2d 747 (1971); *Gentry* v. *Davis,* 512 S.W.2d 4 (1974).

Under Tennessee law, if the mother of an illegitimate child is under the age of eighteen the action to establish paternity may be commenced by her after the removal of the disability of a minority. T.C.A. § 28-1-106 clearly makes age a disability and

tolls statutes of limitation.[1] Thus, where under Texas law the one-year limitation was not tolled during minority, under Tennessee law the mother's cause of action is preserved until a time when she is legally competent to bring the action and continues until she is twenty years old.

Appellant vigorously argues that under Tennessee law the statute of limitations in paternity actions is not tolled for a minor mother. Appellant cites no authority to support this assertion. Appellee submits that under Tennessee law, a minor mother is not emancipated by the birth of a child. Accordingly, T.C.A. § 28-1-106 operates to toll the statute of limitations for a minor mother in paternity proceedings.

In *Mills,* this Court found that the removal of an "impenetrable barrier", as required by *Gomez,* only to be replaced by an opportunity which is so truncated that few could utilize it effectively, did not satisfy due process. These considerations are inapplicable to the case at bar. As previously stated, the Tennessee legislature has afforded illegitimate children the right of support from their father since 1955. The two-year limitation was concommitantly imposed.

In *Mills* a one-year statute of limitation was said to be inadequate because it did not reasonably consider the financial and emotional strain, and confusion which could encumber a mother's filing of a paternity suit within twelve months of the

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[1] T.C.A. § 28-1-106 provides:

> **Persons under siability on accural of right.—If the person entitled to commence an action is, at the time the cause of action accrued, either within the age of eighteen (18) years, or of unsound mind, such person, or his representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceed three (3) years, and in that case within three (3) years from the removal of such disability.**

child's birth. *Mills,* 102 S.Ct. 1547, 1555. Under Tennessee law an unwed mother is afforded a minimum of two years within which paternity actions may be commenced. The two-year minimum applies to actions by mothers over the age of eighteen who do not rely upon public assistance. Further, the two-year statute of limitations does not apply to actions where the father has acknowledged the child in writing or by the furnishing of support. It is reasonable to assume that within two years following the birth of an illegitimate child the financial and emotional obstacles which confront this group of unwed mothers would have dissipated significantly, thus affording the mother a reasonable opportunity to assert a claim of paternity.

In many situations the two-year minimum does not apply. Tennessee mothers who are forced to rely upon public assistance to support their children can have paternity established at any time. *Tennessee Department of Human Services* v. *Lumley,* 638 S.W.2d 381 (1982). Furthermore, unwed minor mothers would have their cause of action preserved until age twenty. *See* T.C.A. § 28-1-106 fn. 1, *supra.* Also, Tennessee's paternity statute places no limitation upon actions to establish paternity and the obligation of support where the father has acknowledged the child in writing or by the furnishing of support. T.C.A. § 36-224(2). These exceptions demonstrate flexibility in Tennesee's statutory scheme and eliminate those repugnant examples so heavily relied upon by the appellant. *See* Appellant's Brief, p. 9, fn. 7; pp. 28, 29. Accordingly, unlike the Texas paternity statute, the Tennessee statute does not so restrict the right of mothers with legitimate claims as effectively to extinguish them.

In *Mills,* the Court analyzed the Texas one-year statute of limiations in paternity actions focusing on two requirements. The Court stated in actions which impose greater restriction upon the illegitimate's right to establish the obligations of support, the statute of limitations must be sufficiently long to present a reasonable opportunity for those with an interest to assert

claims, and the time limitation placed on the opportunity to assert the claim must be substantially related to the state's interests in avoiding the litigation of stale or fraudulent claims.

In *Mills* it was held that the one-year limitation within which the mother may seek support following the birth of her child is as a matter of law too short in duration. Considerations surrounding the birth of a child require that the opportunity to establish support for illegitimate children be longer than one year. *Mills,* 102 S.Ct. 1549, 1555. Obviously, as the Tennessee Supreme Court has stated, two years becomes the minimum period which could possibly be upheld. *Pickett* v. *Brown,* JA, p. 37. Recognizing those circumstances which led this Court in *Mills* to hold unconstitutional the one-year statute of limitations, the Tennessee Supreme Court upheld Tennessee's two-year limitation. The Tennessee Supreme Court found:

> The legislature could rationally determine that two years is long enough for most women to have recovered physically and emotionally, and to be able to assess their and their children's situations logically and realistically. *Pickett* v. *Brown,* JA, p. 37.

Appellee respectfully submits two years is a reasonable time for unwed mothers, over the age of eighteen, to assert just claims.

The requirements in Tennessee that actions to establish paternity and the obligation of support be instituted within a reasonable period following the birth of the child is supported by recognized authority. *See* Harry D. Krause, *Illegitimacy: Law and Social Policy,* Ch. 7, p. 235 (1971); Harry D. Krause, *Child Support in America,* p. 188 (1981). Other legislative bodies have also seen the wisdom of imposing shorter limitations in actions to establish paternity and the obligation of support.

In *Thompson* v. *Thompson,* 285 Md. 488, 404 A.2d 269 (1979), appeal dismissed, 444 U.S. 1062, 100 S.Ct. 1002, 62

L.Ed.2d 745 (1980) Maryland's two-year statute of limitation upon paternity actions was upheld. The statute is substantially similar to Tennesee's in that the two-year limitation does not apply where a putative father has acknowledged paternity in writing or has provided support.

In *State* v. *Witkowski,* 256 N.W.2d 216 (Iowa 1977) the constitutionality of the state's two-year statute of limitation applicable to actions to enforce the obligation of support was upheld. The Court found that the two-year statute of limitation did not amount to an insurmountable barrier and that the Iowa statute was "carefully tuned to alternative considerations". The two-year statute of limitation did not apply where paternity had been judicially established, or has been acknowledged by the father in writing, or by the furnishing of support.

In *Matter of Mores* v. *Feel,* 73 Misc.2d 942, 343 N.Y.S.2d 220 (Family Court of New York Co. 1973) the New York Court upheld the constitutionality of a dual statute of limitation requiring paternity actions to be brought within two years unless paternity is acknowledged in writing or by furnishing support and allowing action to be brought within ten years of birth of child if mother of child was or was likely to become a public charge.

In *Cessna* v. *Montgomery,* 63 Ill.2d 71, 344 N.E.2d 447 (1976) the court found that state's two-year statute of limitation did not unconstitutionally deny equal protection. A state study had found that with the two-year statute of limitation that paternity actions were beset with coercion, corruption, and perjury. Court further found that defendant's problems of proof were substantially increased with the passage of time.

The reasonableness of Tennessee's paternity statute is manifest not only by the two-year limitation, longer than the one-year period in *Mills,* but also by the fact that because of its flexibility the Tennessee statutory scheme does not impose an impenetrable barrier to those with legitimate claims.

As stated by the Court in *Pickett:*

> ". . . the Tennessee statute is 'carefully tuned' to avoid hardship in predictable groups of cases, since it contains an exception for actions against men who have acknowledged their children in writing or by supporting them." *Pickett* v. *Brown,* JA, p. 37.

These exceptions are designed to avoid problems associated with the "practical obstacles" to filing suits within the statutory limitation period. Under Tennessee law an action for support may be maintained on behalf of an illegitimate at any time if the father has furnished support or acknowledged paternity in writing. In these instances a prior adjudication of paternity is not a prerequisite to imposing the duty of support. *See Smelcer* v. *Broyles, supra; Shelly* v. *Central Woodwork, Inc., supra; Brown* v. *Thomas, supra; Reynolds* v. *Richardson, supra; Gentry* v. *Davis, supra.*

Appellant states in her brief that the two-year statute of limitations in paternity action, unlike the statute of limitations in every other form of action is not tolled during the child's minority. Appellant cites no authority for this proposition and appellee posits that this position is not correct. Under T.C.A. § 28-1-106[3] a minor may commence an action after the removal of the disability of minority. Absent authority to the contrary, this statute applies to minor mothers in paternity proceedings.

Further, in the event of the mother's disability, by virtue of minority, the child may bring an action to establish paternity and the obligation of support through a guardian or next friend. *See* T.C.A. § 36-224(1). Thus, under Tennessee law a minor unwed mother's right is clearly protected.

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[3] Statute set forth in footnote 1.

As a matter of law, the Tennessee legislature has rationally determined that the possibility an unwed mother over age eighteen may encounter difficulties within two years following the birth of a child is outweighed by the state's interests in prohibiting litigation of stale and fraudulent claims in paternity proceedings. *Pickett* v. *Brown*, JA, p. 37. The legislature could reasonably conclude that the potential harm to society and putative fathers, defending stale claims is, on balance, greater than the potential harm to illegitimate children whose support right is forfeited by a mother's inaction. *See Cessna* v. *Montgomery*, 344 N.E.2d 447, 453; *Pickett* v. *Brown*, JA, p. 37.

It is well established that statutes of limitation have a legitimate role in the American judicial process. Such statutes are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared. *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 349, 64 S.Ct. 582, 586, 88 L.Ed. 788 (1944). These statutes represent a public policy about the privilege to litigate. *Chase Securities Corporation* v. *Donaldson*, 325 U.S. 304, 314, 65 S.Ct. 1137, 89 L.Ed.2d 1628 (1945). Because of the nature of paternity adjudications generally and in Tennessee specifically, the two-year limitation is substantially related to the State's interest in avoiding the prosecution of stale and fraudulent claims.

In *Pickett* v. *Brown*, the Tennessee Supreme Court articulated several considerations which support the legislative decision imposing a two-year statute of limitation in paternity actions.

> "Its considerations could include the temporary nature of many relationships outside of wedlock; the possibility of formation of new relationships by the mother, putative father and anyone else with whom she might have had relations at the relevant time; the difficulty of producing proof

> to rebut the mother's testimony; the statistics showing the frequency of false and very subjective testimony in this type of case; . . .." JA, p. 37.

Further, the father of an illegitimate child may not be aware that a child has been conceived. To allow a mother to bring an action years after the liason would present obvious problems of proof especially where the putative father had no prior knowledge of the probable obligation which may be imposed.[3] *See Lalli* v. *Lalli, supra; Thompson* v. *Thompson, supra.* Also, undue delay in bringing claims of paternity could result in discord in existing marital relationships where a putative father is required to present proof of non-paternity by testimony of other men who may have had a relationship with the mother during the time of conception. Further, a putative father may find potential witnesses reluctant to testify after they have formed other relationships. These considerations compel the imposition of a statute of limitations which requires the prosecution of claims of paternity before memories have faded, evidence has been lost, witnesses have disappeared or their testimony has become difficult to elicit.

The two-year statute of limitations seeks to strike a balance between the rights of plaintiffs with just claims and the rights of defendants and society in prompt litigation of paternity actions. This principle is true of all statute of limitations and has been recognized as a valid exercise of legislative authority. *See Commission of Welfare of City of New York* v. *Jones,* 73 Misc.2d 1014, 343 N.W.2d 661 (Family Court 1973); *Order of Railroad Telegraphers* v. *Railway Express Agency, supra; Chase Securities Corporation* v. *Donaldson, supra.*

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[3] A study based upon blood test results found that 39.6% of the accused men in disputed paternity cases were not actually the father of the children in question. Harry D. Krause, *Illegitimacy: Law and Social Policy,* p. 107, n. 9 (1971) citing Sussman, *Blood Group Tests — A Review of 1,000 Cases of Disputed Paternity,* 40 AM & J Clinical Pathology 38 (1963); Glazer, *Blood Grouping Tests in the Proof of Non-Paternity,* 33 Michigan State BJ No. 1, pp. 12, 17 (1954).

The balance which the legislation seeks to strike in paternity adjudications is consistent with the fact that paternity actions in Tennessee are viewed as civil in nature. *Frazier* v. *McFerren*, 55 Tenn. App. 431, 402 S.W.2d 467 (1964); *Wilkerson* v. *Benson*, 542 S.W.2d 811 (1976). Thus, no right to counsel is afforded a putative father defending a paternity action. Additionally, plaintiffs in paternity proceedings may prevail if paternity is established by a preponderance of the evidence. This standard of proof coupled with the lack of safeguards which are afforded for defendants in paternity actions compels the imposition of a statute of limitation which is sufficient to require the prosecution of claims of paternity before memories have faded, evidence has been lost, witnesses have disappeared or their testimony has become difficult to elicit. The two-year statute of limitations is substantially related to the State's interest when viewed in the context of paternity adjudications under Tennessee law.

Problems of proof in paternity actions are not alleviated by the fact that a defendant may avail himself of the benefits of HLA blood tests to disprove paternity. Under Tennessee law the results of HLA blood tests are admissible in evidence only when they definitely exclude the defendant as the father of the minor child. T.C.A. § 36-228 provides:

> The Court, on motion of the defendant, shall order the mother, her child and the defendant to submit to one or more blood grouping tests by a duly qualified physician to determine whether or not the defendant can be *excluded as being the father of the child, and the results of such tests may be received in evidence but only in cases where definite exclusion is established.*

The costs of said tests are likely to be born by the defendant. In that under Tennessee law only a father may request blood grouping tests and the results can only be used by the defendant when he is definitely excluded as a possible father, the costs of

said tests are likely to be born by the defendant.[4] Because of the expense which a defendant must assume in acquiring this evidence it is likely that a defendant may not avail himself of HLA tests.[5] Further, complexities involved in calculating the statistical likelihood that an accused man is the real father may confuse jurors charged with the responsibility of determining paternity, potentially resulting in erroneous decisions where the defendant is forced to rely solely upon blood test results to defend the action. *See Sanford N. Kate and Monroe L. Inker, Fathers, Husbands and Lovers: Legal Rights and Responsibilities - Joint AMA/ABA Guidelines: Present Statistics of Serologic Testimony in Problems in Problems of Disputed Parentage* (1979).

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[4] Notwithstanding this Court's ruling in *Little* v. *Streater*, 452 U.S. 1, 101 S.Ct. 2202 (1981), Tennessee Courts have not ruled that the costs of HLA tests may be taxed to the plaintiff or that the State is required to assume the costs of said tests if requested by an indigent defendant.

[5] An informal survey of nine laboratories conducted by Dr. Richard H. Walker, Chairman of the Committee on Parentage Testing of the American Association of Blood Banks in January 1979, produced the following information:

Survey of Charges for Paternity Testing

January 1979

	Red Cell Systems	Enzyme & Protein Systems	HLA	Total Charge for Trio
1. West Coast	9	15	No	$750.00
2. West Coast	9	None	Yes	$600.00
3. No. Central	9	3	Yes	$480.00
4. No. Central	6	10	Yes	$420.00
5. No. Central	5	None	Yes	$400.00
6. West Coast	1	0	Yes	$375.00
7. No. Central	7	1	Yes	$325.00
8. No. Central	8	6	No	$275.00
9. Midwest	6	0	Yes	$450.00

Further, as this Court recognized in *Mills*, notwithstanding the use of blood tests, the defendant may be required to rely upon more conventional forms of proof. As to these more conventional forms of proof, "the State clearly has an interest in litigating claims while the evidence is relatively fresh". *Mills*, 102 S.Ct. 1554, n. 4.

Most defendants against whom paternity actions are brought admit paternity.[6] Certainly, in cases in which allegations of paternity are vehemently denied, it cannot be said that the legislature could not rationally balance the harm to society in general and to a putative father in particular against the potential harm to a child born out of wedlock whose right to parental support may be waived by the mother's inaction. Under such circumstances the legislature may constitutionally impose a two-year limitation with appropriate exceptions for paternity actions.

Under Tennessee law, the support obligation of the father of a child born out of wedlock is ubiquitous. Accordingly, a father is liable for the necessary support of his minor child from his/her date of birth. By imposing a two-year statute of limitations upon actions to establish paternity and support, where the

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Excerpt from *Child Support in America: The Legal Prospective*, Harry D. Krause, Mitchie Company (1981), p. 450. Because of the exhorbitant costs of HLA tests it is not unlikely that defendants may not avail themselves of this probative evidence.

[6] Remarkably, the trial judge, Judge Kenneth Turner, Judge of the Juvenile Court of Memphis in Shelby County, Tennessee has explained: "Ninety-five percent of the suspected fathers admit paternity even before the case comes to trial." *U.S. News and World Report*, p. 50, February 12, 1979; Harry D. Krause, *Child Support in America*, Mitchie Company, Charlottesville, California (1981) p. 449. Thus, in Memphis, Shelby County, less than five percent of the plaintiffs bringing paternity actions would be subject to the statute of limitations.

father has not acknowledged or supported the child, the statute of limitations furthers the interest of the state in promoting justice.

Though it may be said that a longer period of time would serve the State's interests as well as the two-year statute of limitations, this fact alone does not make the Tennessee statute unconstitutional. As this Court has stated in *San Antonio* v. *Rodriguez:*

> Although other alternatives to the challenged statute could be proposed and effective . . . the least restrictive alternatives need not be chosen unless the State impinges on the exercise of fundamental constitutional rights or liberties. *San Antonio School District* v. *Rodriguez,* 411 U.S. 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) citing *Dunn* v. *Blumstein,* 405 U.S. at 343, 92 S.Ct. at 1003; *Shulton* v. *Tucker,* 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960); *San Antonio* v. *Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

And as Chief Justice Burger in *Vlandis* v. *Kline* so aptly stated:

> Literally thousands of state statutes created classifications permanent in duration which are less than perfect, as all legislative classifications are and might be improved upon by individualized determination. *Vlandis* v. *Kline,* 412 U.S. 441, 462, 93 S.Ct. 2230, 2241, 37 L.Ed.2d 63 (1973) see Chief Justice Burger (dissenting opinion).

Legislatures may validly pass laws based upon legislative classifications without violating the Equal Protection Clause of the Fourteenth Amendment. *Parham* v. *Hughes,* 441 U.S. 47, 99 S.Ct. 1742, 60 L.Ed.2d 269 (1979); *Dandridge* v. *Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); *McGowan* v. *State of Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). Said legislation is deemed invalid, in most instances, unless it bears no rational relationship to permissible state objectives. *Parham* v. *Hughes, supra; Dandridge* v. *Williams, supra;* and *McGowan* v. *State of Maryland, supra.*

This Court has applied protections of strict judicial scrutiny to legislative classifications which discriminate against classes of individuals which are:

> saddled with such disabilities or subjected to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *Matthews* v. *Lucas*, 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976).

See San Antonio School District v. *Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

Under the strict scrutiny analysis the Court has required that the basis upon which said legislative clasifications lie be "scientifically substantiated" and subject to mathematical exactness. *Matthews* v. *Lucas, supra; Frontierio* v. *Richardson*, 411 U.S. at 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973). However, this Court has not treated legislative classifications based upon illegitimacy as being within the realm of classes requiring its most exacting scrutiny. *Labine* v. *Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971); *Matthews* v. *Lucas, supra; Trimble* v. *Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977). *See Jimenez* v. *Weinberger*, 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974); *Weber* v. *Aetna Casualty & Surety Company*, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972).

The level of scrutiny applicable to classifications based upon illegitimacy has been variously stated by this Court. The analysis has required, at a minimum, that the statutory classification bear some rational relationship to a legitimate state purpose. *Cf., Matthews* v. *Lucas, supra; Jimenez* v. *Weinberger, supra; Trimble* v. *Gordon, supra; Labine* v. *Vincent, supra; Webber* v. *Aetna Casualty & Surety Company, supra.* This Court's most recent analysis of classifications affecting the rights of illegitimates to parental support has required that restrictions imposed upon illegitimate children which are

greater than those imposed upon legitimate children be "substantially related" to a legitimate state interest to survive equal protection scrutiny. *Mills* v. *Hableutzel,* 456 U.S. ____, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982).

Clearly, Tennessee's two-year statute of limitations applicable to paternity adjudications, where the father has not acknowledged the child in writing or by providing support, and where a mother's minority and public support are not involved, is substantially related to the State's interests in avoiding the prosecution of stale and fraudulent claims. Thus, the two-year statute of limitations imposed upon such paternity actions does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Further, the statute of limitations affords persons wishing to assert claims a reasonable opportunity within which to bring said claims.

II. Tennessee's Legislative Classification Which Allows Actions To Be Brought In Behalf Of Any Child Under The Age Of Eighteen Who Is Or Is Liable To Become A Public Charge Is Rationally Related To The State's Interests In Protecting Public Revenue By Placing The Burden Of Support Of Minor Children Upon Those Who Are Responsible For The Birth.

Appellant asserts that the public charge exception to the limitation period discriminates against an unacknowledged illegitimate who is not a public charge. It is asserted that this provision discriminates unconstitutionally between welfare and non-welfare cases and is therefore "wealth based" discrimination in violation of the Fourteenth Amendment to the United States Constitution. Appellee respectfully submits that appellant has no standing to challenge the constitutionality of this provision. As appellant states in his brief, p. 5, Jeffrey Lee Pickett was not a public charge and the defendant, Braxton Brown, had never acknowledged the minor child nor provided support. Accordingly, the Tennessee Supreme Court expressly

stated in that the constitutionality of the eighteen-year exception to the limitation period was not decided. *Pickett* v. *Brown*, JA, p. 39, n. 6.

The public charge exception challenged by appellant allegedly discriminates among illegitimate children based upon "wealth" or "social standing". In *San Antonio School District* v. *Rodriguez, supra,* this Court held that issues regarding a state system of school financing were subject to the constitutional standard which requires that state action rationally further legitimate state purposes. *San Antonio School District* v. *Rodriguez, supra,* 93 S.Ct. p. 1308. As the Court recognized in *Rodriguez,* wealth-based legislative classifications do not invoke a more stringent standard than mere rationality.

Further, "the existence of some inequality" in the manner in which the state's rationality is achieved does not alone make the legislative action unconstitutional". *San Antonio School District* v. *Rodriguez, supra,* 93 S.Ct. at 1306, citing *McGowan* v. *Maryland,* 366 U.S. 420, 425-426, 81 S.Ct. 1101, 1104-1105, 6 L.Ed.2d 393 (1961). *See Parham* v. *Hughes,* 441 U.S. 347, 99 S.Ct. 1742, 60 L.Ed.2d 269 (1979).

The fact that under Tennessee law illegitimates who receive welfare are treated differently from those who do not, does not render the statute unconstitutional. As this Court has stated:

> ". . . the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective." *McGowan* v. *Maryland,* 366 U.S. 420 at 425, 81 S.Ct. 1101, at 1105, 6 L.Ed.2d 393 (1961).

Clearly, the State's objective in enacting its paternity statute was not to treat all paternity claims equally. The Tennessee paternity statute provides exceptions to the two-year limitation

where the putative father has previously acknowledged the child in writing and where the father has furnished support. The objective was to provide a reasonable scheme for assuring that illegitimate children are supported and that the public does not have to bear the burden of supporting minor children when the child's mother or putative father is capable of doing so. *See Mores* v. *Feel,* 73 Misc.2d 942, 343 N.Y.S.2d 220 (Family Court New York Co. 1973). In *Dandridge* v. *Williams* this Court stated:

> In the area of economics and social welfare, a state does not violate the equal protection clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis", it does not offend the constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality". *Lindsley* v. *Natural Carbonic Gas Company,* 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369. "The problems of government are practical ones and may justify, if they do not require, rough accommodations - illogical, it may be, and unscientific." *Metropolis Theatre Company* v. *City of Chicago,* 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 57 L.Ed. 730. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393. *Dandridge* v. *Williams,* 90 S.Ct. 1153, 1161, 397 U.S. 471, 485 (1970).

Appellee submits that the public charge exception is a constitutionally valid exercise of legislative authority which is rationally related to the State's interests in protecting its public revenue. Protection of the public interests is in the forefront of legitimate interests in the enactment of paternity statutes. *See Kuser* v. *Orkis,* 169 Conn. 66, 362 A.2d 943 (1975); *Vigil* v. *Tofoya,* 60 P.2d 721 (Wy. 1979); *Commissioner of Welfare of City of New York* v. *Jones,* 73 Misc.2d 1014, 343 N.Y.S.2d 661

(Family Court 1973). It is a recognized fact that original laws imposing support of the child on a parent were enacted solely to protect the community from the burden of supporting minor children. *See Sanford N. Kate and Marvin L. Inker, Fathers, Husbands and Lovers: Legal Rights and Responsibilities - Impact of Roe* v. *Wade on Parental Support Statutes: A Constitutional Analysis* (1979). Further, "it is the concern over added public burdens rather than a social conscious which has made it possible in a number of states for the state's attorney . . . to bring an action against the man who is accused of being the father of the child". Francis W.H. Kuchler, *Law of Support*, p. 38, 3d Ed. (1980). This purpose is likewise reflected in national policy as expressed by Amendments to Title IVD of the Social Security Act relative to recipients of public aid.[7] 42 U.S.C.A. § 654. *See* Kuchler, *Law of Support, supra,* pp. 31 & 32.

Legislation which treats government litigants differently from private litigants is firmly grounded upon principles of public policy. This policy is expressed most clearly in the state's exemption from limitations which apply to actions between the government and private litigants. *See* T.C.A. § 28-1-113, Appendix (i.); *Anderson* v. *Security Mills,* 175 Tenn. 197, 133 S.W.2d 478 (1939). This policy is also evidence in Tennessee statutory and consitutional provisions prohibiting actions against the State. *See* T.C.A. § 20-13-102; Tenn. Const. Art. I, § 17, Appendix (i). These provisions are based upon the public policy of preserving and protecting revenues meant to be expended for the benefit of the public. *See Guaranty Trust Company* v. *United States,* 304 U.S. 126, 132, 58 S.Ct. 785, 82 L.Ed. 1221 (1938).

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[7] Pursuant to 42 U.S.C.A. § 602(a) state welfare agencies are required to establish a single identified unit, whose purpose is to undertake to establish paternity of each child receiving welfare who was born out of wedlock and to secure support for him or her.

Under T.C.A. § 36-224(2) the Department of Human Services or any person is empowered to bring an action on behalf of any child under the age of eighteen who is or is liable to become a public charge.[1] This provision is clearly based upon the public policy of preserving and protecting public revenues. A minor child may not require public assistance until after age two. In such instances, the State's interests requires that the duty of paternal support be established. Thus, the legislature could rationally conclude that the State's interests in protecting its purse necessitates a longer period within which the State may bring an action to establish paternity and the obligation of support.

In paternity cases, the State has a strong interest in protecting the public treasury and in assuring that at least one person will be financially responsible for a child. This interest does not exist when the child is not a public charge and is adequately supported by its mother or some other person. However, when the child requires public assistance, the State acquires a strong interest in identifying the father. *See Pickett* v. *Brown*, JA, p. 39; *Mores* v. *Feel*, 73 Misc.2d 942, 343 N.Y.S.2d 220 (Fam. Ct. N.Y. Co. 1973).

The public charge exception reflects a balance between the risk of using stale evidence and the need to adjudicate paternity of children who rely upon the State for their support. The strong public interest in protecting the State treasury, when added to the interests of the mother and the child, tilts the balance in favor of a longer period to establish paternity for persons who rely upon the State for their welfare. Thus, this provision reflects a rational determination by the legislature which furthers the State's legitimate interest in protecting the public treasury from unnecessary financial burdens.

---

[1] Appellant asserts that the provision of this statute which refers to "any child who is liable to become a public charge" applies to unborn children. Appellant cites no authority for this contention. It is the position of appellee that this provision applies to any minor child born or unborn. *See Young* v. *Willis*, 436 S.W.2d 445 (1968).

III. Tennessee's Paternity Statute Which Affords The Mother Or One Acting In Her Stead The Right To Bring An Action To Establish Paternity Or The Obligation Of Support Within Two Years Following The Birth Of The Child, Where There Has Been No Acknowledgement Of Paternity, Does Not Violate Principles Of Due Process.

A. The legislative determination conferring the right to establish paternity upon the mother or one acting in place of the mother does not constitute a violation of due process.

State statutes are not violative of due process under general principles of substantive due process, unless they are found to be unreasonable, arbitrary or capricious. *See* 16A Am.Jur.2d *Constitutional Law,* ¶ 816. The legislative determination authorizing a mother, or one acting in place of the mother, to bring an action to establish paternity cannot be said to be unreasonable. This Court has acknowledged that a state could enact a limitation period on actions to establish support which is shorter than the child's minority. *See Mills* v. *Hableutzel,* 102 S.Ct. 1554. Generally speaking, actions brought on behalf of a child during his minority will be brought by the mother. *Id.* The legislature could reasonably and rationally conclude that the decision whether to institute a paternity action is in the child's best interests rests with the mother. *See Thompson* v. *Thompson,* 404 A.2d 269 (1979). Further, appellee submits that to allow a minor child the right to establish paternity notwithstanding a parental decision not to do so may constitute a violation of the mother's right to freedom of personal choice in matters of family life and pose an unwarranted governmental intrusion into a private realm of family life. *See Parham* v. *J.R.,* 442 U.S. 584, 602, 610, 99 S.Ct. 2493, 2504, 2508, 61 L.Ed.2d 101 (1979); *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, 639-640, 94 S.Ct. 791, 796, 39 L.Ed.2d 52 (1974); *Prince* v. *Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944).

The Tennessee legislature has determined that actions to establish paternity must be brought by the mother or one standing in her stead. The reasonableness of the decision is supported by this nation's "strong tradition of parental concern for the nuture and upbringing of their children. This primary role of the parent in the upbringing of their children is now established beyond debate as an enduring American tradition . . ." *Wisconsin* v. *Yoder,* 92 S.Ct. 1526, 1541, 1542, 406 U.S. 205, 232, 32 L.Ed.2d 15 (1972).

The failure of the legislature to authorize a cause of action for minor children to esablish paternity or support under T.C.A. § 36-224 cannot be said to be violative of principles of due process. It is reasonable to assume that the mother can protect her child's interest in establishing support. Further, pursuant to T.C.A. § 36-224(1) an action to establish paternity and the obligation of support may be brought on behalf of a minor child through a guardian or next of friend in the event of the death or disability of the mother. Thus, in instances where the mother suffers from a disability by virtue of her minority, a minor child may assert his right to establish paternity through a person who is legally competent to do so. Accordingly, Tennessee's paternity statute provides illegitimates reasonable procedures through which the obligation of support may be established.

Appellant has relied upon language cited from the case of *Rose Funeral Home, Inc.* v. *Julian,* 176 Tenn. 534, 144 S.W.2d 755 (1940) to support his contention that a child has a cause of action for support. In *Rose Funeral Home,* an undertaker brought an action against the father of a deceased child for funeral expenses incident to the burial of the child. The mother and father were divorced prior to the death of the child. The mother of the child had instructed the plaintiff funeral home that she would be responsible for the funeral expenses incident to the child's death. Notwithstanding, the plaintiff instituted an action for the funeral bill against the father. The Tennessee Supreme Court held that the mother's agreement to perform her

statutory duty did not discharge the father's statutory obligation. In reaching its decision, the Tennessee Supreme Court stated:

> Where the divorce decree awarding the custody of the child to the mother provides that the father shall contribute to its maintenance, it is logically held that such a decree relates merely to the relative rights and duties of the parents toward each other. Since the child is not a party to such suit, the child's rights as against the father are not affected. (citation omitted).

The import of the above quote was not to confer upon the child a cause of action against the father. Indeed such would have been impossible in that the child was dead at the time of the cause of action. Accordingly, any rights which the child may have had were not the subject of that cause of action. Thus, appellant's reliance upon *Rose Funeral Home* to support his contention that a child has a cause of action for support, is misplaced.

The Supreme Court in *Pickett* v. *Brown* accurately stated the law in Tennessee relative to the rights of illegitimate children to bring an action to establish paternity and support. T.C.A. § 36-224(1) does not permit an action to be brought by the child except in case of death or disability of the mother, and then the action must be brought through an appropriate representative.

B. The two-year statute of limitations represents a reasonable balance between the conflicting interests of the mother and child, the putative father's right to have the claim of paternity timely litigated and the public's interest in the prompt adjudication of paternity claims.

Statutes of limitations are subject to constitutional attack for lack of due process only when the legislative determination in weighing conflicting interests is arbitrary or capricious. Thus, the test of due process in evaluating a statute of limitations is a test of reasonableness. *Hargraves* v. *Brackett Stripping Machine Company,* 317 F.Supp. 676 (D.C. E.D. Tenn. 1970). As

discussed in Part I of appellee's brief, in enacting limitation periods the legislature must weigh conflicting interests between one person's right to enforce an otherwise valid claim; another person's right to be confronted with any claim before time has likely rendered unavailable or difficult matters; and the public's interest in prompt adjudication of paternity claims.

The reasonableness of the two-year limitation period has been discussed in Part I of appellee's brief. The legislative requirement that a paternity action be brought within two years following the birth of the child in cases where problems of proof are likely to arise cannot be said to be so arbitrary or capricious as to be violative of the due process clause. *See Hargraves* v. *Brackett Stripping Machine Company, supra,* at p. 683. *See* Appellee's Brief, Part I, pp. 4-12.

C. **Principles of procedural due process are inapplicable to plaintiff's claim.**

Plaintiff is not denied a property interests by the imposition of a statute of limitations. The legislature has defined the parameters of appellant's cause of action and attached thereto a two-year limitation period. If as appellee has argued the two-year statute of limitations is reasonable, the legislative determination provides appellant with all the process that is due. *See Logan* v. *Zimmermann Brush Company,* 102 S.Ct. 1148 at 1157 (1982).

Appellant's assertion that failure to afford her actual notice of the two-year limitation deprives her of due process cannot be viewed as a serious argument. All persons are charged with knowledge of the law. The impracticality of requiring the State to furnish actual notice of the two-year statute of limitations in paternity actions to a mother or one standing in her stead and to provide notice of the consequences of failure to establish the claim becomes obvious when taken to its logical extension. Further, the cost of providing such notice is clearly a fact which must be considered. As the Court noted in *Parham* v. *J.R.:*

> It should be realized the procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the costs of providing such protection, and that the expense of protecting those likely to be found undeserving will probably come out of the pockets of the deserving. Quoting from Friendly, "Some Kind of Hearing" 123 Univ. Pa. L. Rev. 1267, 1276 (1975) *Parham* v. *J.R.*, 99 S.Ct. 2493, 442 U.S. 584, 61 L.Ed.2d 101 (1979) n. 14.

Further, appellant's suggestion that persons bringing actions on behalf of minor children born out of wedlock be provided with counsel is not supported by judicial precedent. To the contrary, this Court has stated that the right to counsel is not a constitutional requirement which deprives a parent of due process. *Lassiter* v. *Department of Social Services of Durham City,* 101 S.Ct. 2153 (1981).

CONCLUSION

For the reasons stated herein, appellee respectfully submits that Tennessee's two-year statute of limitations in certain paternity actions is substantially related to legitimate state interests and affords persons with legitimate claims a reasonable opportunity to assert them. Thus, Tennessee's paternity statute is entitled to a presumption of validity. Further, T.C.A. § 36-224 represents a reasonable exercise of legislative authority which is rationally related to legitimate state interests. Accordingly, T.C.A. § 36-224 is not violative of the Equal Protection or Due Process Clauses of the Fourteenth Amendment and the validity of the statute should be upheld. The decision of the Tennessee Supreme Court in *Pickett* v. *Brown* should be affirmed and appellant's appeal dismissed.

Respectfully submitted,

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APPENDIX

Article 1, Section 17, Constitution of Tennessee

Sec. 17. Open courts - Redress of injuries - Suits against the State. - That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.

Tennessee Code Annotated, section 20-13-102

Actions against state prohibited. — (a) No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state.

(b) No statutory or other provision authorizing the University of Tennessee and its board of trustees to sue and be sued shall constitute a waiver of sovereign immunity.

Tennessee Code Annotated, section 28-1-106

Persons under disability on accrual of right. — If the person entitled to commence an action is, at the time the cause of action accrued, either within the age of eighteen (18) years, or of unsound mind, such person, or his representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceed three (3) years, and in that case within three (3) years from the removal of such disability.

Tennessee Code Annotated, section 28-1-113

Actions by state. — The provisions of this title do not apply to actions brought by the state of Tennessee, unless otherwise expressly provided.

Tennessee Code Annotated, section 34-101

Fathers and mothers joint and equal natural guardians of minor children — Equally charged with support and other duties. — Fathers and mothers are joint natural guardians of their minor children, and they are equally and jointly charged with their care, nurture, welfare, education, and support, and also with the care, management and expenditures of their estates. Fathers and mothers have equal powers, rights, and duties with respect to the custody of their minor child or children, and the control and the services and earnings of such minor child or children; provided, that so much as may be necessary of the net income of such minor child may be expended in his care, maintenance and education.

Tennessee Code Annotated, section 36-228

Blood tests to determine paternity. — The court, on motion of the defendant, shall order the mother, her child and the defendant to submit to one or more blood grouping tests by a duly qualified physician to determine whether or not the defendant can be excluded as being the father of the child, and the results of such tests may be received in evidence but only in cases where definite exclusion is established.

No. 82-5576

MOTION FILED
JAN 20 1983

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FRANCES ANNETTE PICKETT

AND

FRANCES ANNETTE PICKETT,

Appellants,

v.

BRAXTON BROWN,

Appellee,

AND

WILLIAM M. LEECH, JR.,

Intervenor-Appellee.

On Appeal from the
Supreme Court of Tennessee

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE ON BEHALF OF THE CHILDREN'S DEFENSE FUND AND THE WOMEN'S LEGAL DEFENSE FUND (In Support of Appellants)

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IN THE
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OCTOBER TERM 1982

No. 82-5575

JEFFREY LEE PICKETT
BY HIS NEXT FRIEND,
FRANCES ANNETTE PICKETT
AND
FRANCES ANNETTE PICKETT,

Appellants,

v.

BRAXTON BROWN,

Appellee,

AND

WILLIAM M. LEECH, JR.,

Intervenor-Appellee.

On Appeal from the
Supreme Court of Tennessee

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE ON BEHALF OF THE CHILDREN'S DEFENSE FUND AND THE WOMEN'S LEGAL DEFENSE FUND

The Children's Defense Fund and the Women's Legal Defense Fund respectfully move this Court for leave to file a brief amici

curiae, in support of appellants, in the above-captioned case.

Movants have long advocated the rights of children and of women. Experience in such work demonstrates that limitations on the right of illegitimate children to establish child support obligations, such as Tennessee's two-year statute of limitations at issue in the case at bar, have a host of grave social and economic consequences for such children and their mothers.

Movants' proposed brief amici curiae presents only three major points, all aspects of the equal protection challenge to the Tennessee statute. Movants bring to this brief both their expertise in application of the Equal Protection Clause to classifications based on illegitimacy, and their extensive

experience in the "real-life" needs and problems of unwed mothers and their children seeking child support.

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IN THE
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No. 82-5576

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Appellants,

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AND

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Intervenor-Appellee.

On Appeal from the
Supreme Court of Tennessee

BRIEF AMICI CURIAE ON BEHALF OF THE CHILDREN'S DEFENSE FUND AND THE WOMEN'S LEGAL DEFENSE FUND

INTERESTS OF AMICI CURIAE

The Children's Defense Fund is a national public charity representing and providing advocacy on behalf of low-income, minority, and handicapped children. The Children's

Defense Fund works through litigation, public education, analysis of public policy and other methods to improve the care and development of children and their economic status.

The status of illegitimacy, and the legal disabilities that have surrounded that status, have had terribly injurious effects on children. Statutes such as the one at issue in this case and others cutting illegitimate children off from private or public support put such children at a tremendous economic disadvantage.[1/] The society also unjustly stigmatizes such children for the parents' actions, "contrary to the basic concept of our system that legal burdens should bear some

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1/ See, e.g., Trimble v. Gordon, 430 U.S. 762 (1977) (state gave no right to intestate succession); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (state gave no right to welfare to some illegitimate children); Gomez v. Perez, 409 U.S. 535 (1973) (state gave no right to child support); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (state denied workmen's compensation survivors' benefits); Levy v. Louisiana, 391 U.S. 68 (1968) (state denied wrongful death benefits); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md. 1972), aff'd mem., 409 U.S. 1069 (1972) (preference to legitimate children in distribution of father's Social Security insurance).

relationship to individual responsibility or wrongdoing," thereby producing "social opprobrium . . . relating to status of birth." Jimenez v. Weinberger, 417 U.S. 628, 632 (1974). This has alienated such children, Marcus, "Equal Protection: The Custody of the Illegitimate Child," 11 Journal of Family Law 1, 17-18 (1971), and produced worse adjustment and lower test scores for illegitimate children. Jenkins, "An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children," 64 American Journal of Sociology 196 (1958). For these reasons, the Children's Defense Fund is concerned about the denial of equal rights to illegitimate children.

The Women's Legal Defense Fund (WLDF), with about 1,000 members, is a tax-exempt organization founded in 1971 to work for equal rights for women. It represents women and men challenging barriers to sexual equality, advocates on behalf of feminist legal principles,

and conducts public education programs primarily in the areas of family law, employment discrimination, and education. The issue presented in the instant case is of enormous practical and legal significance to WLDF's client population and constituency.

If present trends continue, by the year 2000, 100% of the nation's poor adults would be women, mostly the heads of single-parent families.[2/] A major contributing factor to this "feminization of poverty"[3/] is the widespread ineffectiveness of the child support enforcement system.[4/] Any unnecessary practical barrier to the establishment or enforcement of child support obligations, such as the two-year cut-off of the right to establish

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2/ National Advisory Council on Economic Opportunity, The American Promise: Equal Justice and Economic Opportunity (1981).

3/ Id.

4/ Bureau of the Census, U.S. Dept. of Commerce, Child Support and Alimony: 1978, Current Population Reports, Series P-23, No. 106 (1980); see also L. Weitzman, The Marriage Contract: Spouses, Lovers and the Law 126-34 (1981).

paternity at issue in this case, is of great concern.

Such a barrier is particularly offensive when it discriminates on the basis of status -- here, illegitimacy -- which, like sex as well as "race or national origin, [is] a characteristic determined by causes not within the control of the . . . individual."[5/] The "rubber stamp" kind of review of this illegitimacy-based classification conducted by the Tennessee Supreme Court must be of concern to all who care about the integrity of the Equal Protection clause.

Moreover, discrimination against illegitimate children also materially affects their mothers. When laws arbitrarily relieve men of the duty to support their children, women suffer clear economic disadvantage. That economic disadvantage burdens also the mother's constitutionally protected right to the companionship, care, and custody of the child.

5/ Mathews v. Lucas, 427 U.S. 495, 505 (1976).

See Weinberger v. Wiesenfeld, 420 U.S. 636, 652 (1975). Moreover, women historically have borne and currently bear a greatly disproportionate share, compared to fathers, of the stigma, impaired social position, condemnation, and punishment resulting from parenting illegitimate children.6/

SUMMARY OF ARGUMENT

I.

For the second time in two years this court must consider the constitutionality of a state discrimination against illegitimate children in the field of child support. Tennessee, as did Texas in Mills v. Habluetzel, ___ U.S. ___, 102 S.Ct. 1549 (1982), has a statute of limitations imposing a very short period during which illegitimate children are allowed to establish paternity and thereby obtain child support. In contrast, legitimate

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6/ See, e.g., Secretary of the United Nations, Report: The Status of the Unmarried Mother: Law and Practice 56 (1971); Vincent, "Teenage Unwed Mothers in American Society," XXII, No. 2 The Journal of Social Issues 22, 30-31 (April 1966); Krause, "Equal Protection for the Illegitimate," 65 Mich. L. Rev. 477 (1967).

children can commence a support action at any time. The Tennessee law violates the principle that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." Mills, 102 S.Ct. at 1551; Gomez v. Perez, 409 U.S. 535 (1973).

II.

The Tennessee Supreme Court paid only lip service to the requirement that any discrimination against illegitimate children must be substantially related to a legitimate state interest. In actuality, the Tennessee Supreme Court crafted its own test to measure the statute, misapplied even that test, and ignored the reasoning of both the opinion for the Court in Mills v. Hableutzel and the concurring opinions that were joined by five Justices. Nor did the Tennessee Supreme Court pursue the searching inquiry required by this Court's host of earlier holdings that laws that discriminate against illegitimate children must be precisely structured to advance evident and substantial state interests.

III.

Under Mills, the only state interest that can possibly justify a shorter statute of limitations for illegitimate than for legitimate children is the state interest in protecting against stale or fraudulent claims. Tennessee, however, has a two-tiered system: the normal statute of limitations is two years, but when a child is likely to become a public charge, the limitation period is eighteen years. The Tennessee legislature has therefore itself determined that claims do not become too stale or potentially fraudulent for eighteen years.

The fact that Tennessee has not accorded its purported state interest in the limitations period any weight with regard to children undercuts the asserted legitimacy of that interest with regard to other children born out of wedlock.

The stale and fraudulent claim rationale for the two-year period thus must be considered merely a pretext for invidious

discrimination against illegitimate children. This is not a legitimate, much less a substantial, state interest. The only other asserted Tennessee interest, that of saving welfare costs, is a legitimate interest but bears no rational relationship to imposing the two-year limitation period. Tennessee's two-tiered system thus irrationally discriminates both against and among illegitimate children. See Jimenez v. Weinberger, 417 U.S. 628 (1974).

IV.

Any statute that sets a shorter limitation period for illegitimate children than for legitimates must be based on a "real threat of loss or diminution of evidence or increased vulnerability to fraudulent claims" at the stage after the limitation period. Mills, 102 S.Ct. at 1554. By creating an eighteen-year exception, Tennessee not only abandoned any concern with this threat, but it has also made no showing that such a "real threat" exists after two years. The Tennessee Supreme Court

gave no consideration to the "unique" evidentiary nature of paternity proceedings, Little v. Streater, 452 U.S. 1, 6 (1981), including such factors as blood tests, a key evidentiary element that is highly reliable and unchanging over time. Other evidentiary elements of paternity proceedings are also less likely to be lost over time than evidentiary elements of other proceedings. The Tennessee Supreme Court failed to review the actual evidentiary nature of the proceedings and failed to establish the requisite threat. Tennessee's unanalyzed pretense of concern with false or stale claims thus merely masks invidious discrimination. The statute is not designed to advance permissible state interests.

ARGUMENT

I. INTRODUCTION

In Gomez v. Perez, 409 U.S. 535 (1973), this Court invalidated a Texas law that gave a right to support to legitimate children but not to illegitimate children. Applying the

Equal Protection Clause of the Fourteenth Amendment, the Court held:

> [O]nce a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers, there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. 409 U.S. at 538.

In Mills v. Habluetzel, ___ U.S. ___ , 102 S.Ct. 1549, 1552 (1982), this Court considered Texas' "less than generous" response to Gomez. Texas gave children only a "one-year window" to bring actions for paternity and thereby to establish a right to child support. 102 S.Ct. at 1552. In Mills this Court, unanimously invalidating the Texas one-year limitations period, reiterated the principle that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." 102 S.Ct. at 1551, quoting Gomez, 409 U.S. at 538.

If the Texas response to Gomez was "less than generous," the Tennessee response to

Mills which is at issue in this case -- upholding a two-year period of limitations -- is worse than grudging. The Tennessee Supreme Court itself recognized that the state law was "obviously, in the wake of Mills, . . . the minimum period which could possibly be upheld." Pickett v. Brown, 638 S.W.2d 369, 379 (Tenn. 1982). It nevertheless erroneously upheld the law, using a mechanical, result-oriented analysis that paid extensive lip service to Mills but in actuality disregarded the reasoning in Mills and the long line of precedent that led up to that holding.

The Tennessee Supreme Court's decision is simply wrong under Mills. Because of the recent consideration by this Court of a practically identical statute, amici will focus on just three aspects of this case. All three aspects involve the equal protection rather than the due process challenge to the Tennessee statute. The first is a brief description of how the Tennessee Supreme Court distorted

the principles of Mills and ignored the teachings of other, related decisions from this Court. The second discusses the utter irrationality under Mills of Tennessee's two-tiered statute of limitations. The third addresses the Tennessee Supreme Court's complete failure to examine carefully the very limited extent to which proof problems exist in paternity and child support cases.

II. THE TENNESSEE SUPREME COURT DISTORTED THE APPLICABLE PRINCIPLES OF LAW.

It is well-established that a differentiation between legitimate and illegitimate children must be "substantially related to a legitimate state interest." Mills, supra, 102 S.Ct. at 1554. See also Lalli v. Lalli, 439 U.S. 259, 265 (1978). While the Tennessee Supreme Court purported to apply this test, it ignored both the way it was applied in Mills and this Court's consistent instructions that courts should undertake much more than a cursory review of a state's asserted "interests" when

scrutinizing laws that discriminate against illegitimate children.

Indeed, the Tennessee Supreme Court boiled the question down to one that significantly differed from the Mills analysis: "[t]he inquiry, then, [is] whether the state's policy . . . affords a fair and reasonable opportunity for the mother to decide in a rational way whether or not the child's best interest would be served by her bringing a paternity suit." Pickett v. Brown, 638 S.W.2d at 376. This ignores both the established principle of the child's pre-eminent right to support regardless of her or his birth status, and the Mills analysis of the circumstances that can affect the ability of the child's mother (or other representative) to pursue that right. In striking down Texas' one-year limitations period, the Mills Court recognized that circumstances change, that an unmarried mother who does not file a support action within one year of her child's birth might rationally decide to do so more than one year after the

birth.[7] The Court pointed to several considerations, including community disapproval, the status of the mother's relationship with the father, and the mother's financial constraints associated with loss of income or expenses related to the newborn, as influencing the timing of a mother's decision.[8]

Precisely the same considerations may operate more than two years after a child's birth as well. But in Tennessee the mothers

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7/ In her separate concurring opinion, Justice O'Connor recognized that "the practical obstacles to filing suit within one year of birth could as easily exist several years after the birth of the illegitimate child." Mills v. Habluetzel, 102 S.Ct. 1549, 1556 (1982) (O'Connor, J., concurring).

8/ In addition to these changeable factors, other factors that a mother would or could rationally consider and that would affect her decision when to file a paternity action include: the father's financial circumstances (the use of the mother's frequently scarce resources to retain counsel and sue a poor, young and unemployed, or unreliable man might be inappropriate for the first two years, but the man's situation could change); the danger of physical or emotional harm to the mother or child if a lawsuit is filed; the mother's own status as a minor, frequently ignorant of the law or confused or deferring to a parental decision; increased costs (e.g., day care, school, or medical care) as the child grows older; the fact that the mother has not yet exhausted all other means of support; and lack of access to counsel.

of legitimate children can react to such changing circumstances, regardless of when in a child's minority they occur; the mothers of illegitimate children cannot. In addition, mothers of legitimate children can act irrationally at first and make a "rational" decision later. Illegitimate children, however, will suffer if their mothers make a mistake. The test applied in Tennessee, therefore, does not provide equal protection; it merely provides a new formulation for punishing illegitimate children for the actions of their parents.9/ The Tennessee court merely nods in the direction of Mills, but its analysis is based on an entirely different premise.

Indeed, the Tennessee Supreme Court paid more attention to a series of pre-Mills state court decisions than it did to Mills itself. For example, it relied on Matter of Mores v.

9/ Cf. Logan v. Zimmerman Brush Co., ___ U.S. ___, 102 S.Ct. 1148 (1982) (Powell and Rehnquist, JJ., concurring) ("As petitioners possessed no power to convene hearings, it is unfair and irrational to punish them for [someone else's] failure to do so.")

Feel, 73 Misc.2d 942, 343 N.Y.S.2d 220 (Fam. Ct. N.Y. Co. 1973), implying agreement with what the Tennessee court described as Mores' "interesting interpretation of legislative purpose," to wit,

> that the legislative purpose was clearly not to assure to all illegitimates an equal chance of establishing paternity . . . . Rather, it was more likely to assure that illegitimates were supported and educated by someone (mother, father, or public welfare) . . .. Pickett v. Brown, 638 S.W.2d at 375.

This position seriously understates the strong principle of achieving the greatest possible equality for illegitimate children that this Court has articulated in fourteen years of decisions. Perhaps the Mores court could not have anticipated in 1973 the full development of this principle, but the Pickett court in 1982 was negligent in failing to grasp what is now a well-established equality principle. "[T]he sine qua non of [such] equal legal rights [is] the identification of the person against whom the rights may be asserted."

National Conference of Commissioners on Uniform State Laws, Uniform Parentage Act (1973), Prefatory Note at 5.[10/] Moreover, this principle of equality necessarily includes a right to support from both the father and mother, not merely one or the other ("someone," in the language of the Tennessee Supreme Court). The right is one of equal protection of the laws, not one of mere subsistence on an unequal basis.[11/]

10/ Section 7 of this Act provides a twenty-one year statute of limitations. The Commissioners' 1960 Uniform Act on Paternity, section 3, similarly had no statute of limitations during minority, but the father's liability for past support was limited to four years preceding the action.

11/ Similarly, the Tennessee Supreme Court relied heavily on Cessna v. Montgomery, 63 Ill.2d 71, 344 N.E.2d 447 (1976), describing it as "[a] landmark state court case." 638 S.W.2d at 374. Cessna pre-dated not only Mills, but also this Court's decision in Trimble v. Gordon, 430 U.S. 762 (1977) (reversing the Illinois Supreme Court). Cessna's analysis generally followed that which the Illinois Supreme Court had erroneously followed in Trimble. Even before Mills, then, "[t]he conclusion that the reasoning in Cessna cannot stand after the analysis in Trimble [was] manifest." Kessler & Weinstein, "An Illegitimate's Gripe: Unequal Protection Under the Illinois Paternity 'Limitations' Provision," 69 Ill. Bar Journal 738, 745 (1981). Cf. Logan v. Zimmerman Brush Co., ___ U.S. ___, 102 S.Ct. 1198 (1982), reversing 80 Ill.2d 99, 411 N.E.2d 277 (1980).

At the same time as it relied on such cases as Mores and Cessna, the Tennessee Supreme Court failed to follow the approach taken by a number of better-reasoned state court decisions that strike down limitations on establishing paternity. E.g., In the Matter of M.D.H., 437 N.E.2d 119 (Ind. Ct. App. 1982) (two-year statute; "[a]t least five of the Justices [in Mills] intimate that any period of limitation shorter than the age of majority . . . might also be found to be unconstitutional."); Oregon v. Bradley, 58 Ore. App. 663, 650 P.2d 91 (Ore. Ct. App. 1982) (six-year statute; "[t]he decision in Mills clearly establishes that short periods of limitation in filiation proceedings are unconstitutional.").[12/] Such a one-sided analysis is at best disingenuous.

12/ See also, Commonwealth v. Gruttner, 385 Mass. 474 (1982) (six-year statute violates equal protection) (dictum); West Virginia ex rel. S.M.B. v. D.A.P., 284 S.E.2d 912 (W. Va. 1981) (three-year statute violates equal protection and due process); County of Lenoir ex

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Of equal significance is the fact that the Tennessee Supreme Court ignored entirely the separate opinions in Mills. Five justices wrote or joined in concurring opinions emphasizing that the invalidation of a one-year period by no means necessarily implied approval of longer periods, such as Texas' later-enacted four-year statute of limitations. Justice O'Connor wrote for four members of the Court:

> I fear that the [Court's] opinion may be misinterpreted as approving the four-year statute of limitation now used in Texas.
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> I.
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> [I]t is not only birth-related circumstances that compel the conclusion that the statutory distinction in this case between legitimate and

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(footnote cont'd)

rel. Cogdell v. Johnson, 46 N.C. App. 182, 264 S.E.2d 816 (N. Car. Ct. App. 1980) (three-year statute violates equal protection and due process); Stringer v. Dudoich, 92 N.M. 98, 583 P.2d 462 (1978) (two-year statute violates equal protection).

illegitimate children is unconstitutional. To begin with, the strength of the asserted state interest is undercut by the countervailing state interest in ensuring that genuine claims for child support are satisfied.

* * *

It is also significant to the result today that a paternity suit is one of the few Texas causes of action not tolled during the minority of the plaintiff. Of all the difficult proof problems that may arise in civil actions generally, paternity, an issue unique to illegitimate children, is singled out for special treatment. [I]t is fair to question whether the burden placed on illegitimates is designed to advance permissible state interests.

102 S.Ct. at 1556-57 (O'Connor, J., concurring). Justice Powell refused to join Justice Rehnquist's opinion, also due to a concern "that the Court's opinion may be read as prejudging the constitutionality of longer periods of limitation." 102 S.Ct. at 1558 (Powell, J., concurring). Accordingly Justice Powell wrote separately and joined in Part I of Justice O'Connor's opinion. Id. at 1558.

Justice O'Connor's suggestion that "it is fair to question" the state's actual purposes emanates from this Court's extensive experience with laws discriminating against illegitimate children and perverse state rationales for such laws. In Mathews v. Lucas, 427 U.S. 495 (1976), the Court held that discrimination against illegitimate children is not subject to an equal protection "strict scrutiny" test, but also made clear that normal "rational basis" equal protection review is insufficient. Rather, the Court articulated a form of heightened scrutiny, emphasizing that the standard of review applied is "not a toothless

one." Mathews v. Lucas, 427 U.S. 495, 510 (1976).[13/]

The statute in Lucas survived such rigorous review by using "reasonable empirical judgments that [were] consistent with a design to qualify entitlement" and that accorded illegitimate children a full opportunity to present relevant evidence. 427 U.S. at 510. "[T]he statute [in Lucas did] not broadly discriminate between legitimates and illegitimates without more, but [was] carefully tuned to alternative considerations." 427 U.S. at 513. See also, Lalli v. Lalli, 439 U.S. 259, 266 (1978); Trimble v. Gordon, 430 U.S. 762, 767 (1977).

Subsequent to Lucas, the Court has continued to emphasize the applicability of a

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13/ In Lucas, the Court reaffirmed its previous statements that ". . . the legal status of illegitimacy, however defined, is like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society," and that imposing disabilities on innocent children simply because of their birth status is "illogical and unjust." 427 U.S. at 505.

heightened standard of review to classifications disfavoring illegitimate children. "In a case like this, the Equal Protection Clause requires more than the mere incantation of a proper state purpose." Trimble v. Gordon, 430 U.S. 762, 769 (1977). Moreover, the relationship between the statutory scheme and the asserted state interests must be "evident and substantial." Lalli v. Lalli, 439 U.S. 266, 268 (1978). (Emphasis added.)

In sum, the Court has upheld statutory classifications discriminating against illegitimate children only "[i]n cases where statutory classifications affecting illegitimates are so precisely structured as to further a sufficiently adequate state interest . . ." Parham v. Hughes, 441 U.S. 347, 352 n.5 (1979). (Emphasis added.)

The interest that Tennessee has asserted (preventing stale or fraudulent claims) is a legitimate state interest in the abstract. Nonetheless, it is not "sufficiently adequate" to justify a two-year period of limitations,

Parham v. Hughes, 441 U.S. at 352 n.5. However, that issue need not even be addressed in this case. The Tennessee statute at issue in this case is so imprecisely tailored, so heedless of alternative considerations, that it makes the relationship between the statutory scheme and the state interests wholly impenetrable and insubstantial. This is best demonstrated by the two-tiered aspect of the Tennessee system, applying an eighteen-year period of limitations to some children, which is discussed in the next section. It was only by pursuing a toothless review, by accepting the mere incantation of a state purpose, that the court below could sustain the statute.

III. TENNESSEE'S TWO-TIERED STATUTE OF LIMITATIONS DEMONSTRATES THAT ITS TWO-YEAR LIMITATION PERIOD IS NOT BASED ON A CONCERN ABOUT FALSE OR STALE CLAIMS, AND THE STATUTE THEREFORE DISCRIMINATES IRRATIONALLY BOTH AGAINST AND AMONG ILLEGITIMATE CHILDREN.

The clearest demonstration of the Tennessee Supreme Court's incorrect approach is found in the way in which that court considered the relationship between the two-year

rule and Tennessee's separate eighteen-year statute of limitations for paternity proceedings on behalf of a child likely to become a public charge. T.C.A. § 36-224(2). The Tennessee Supreme Court relied on the eighteen-year provision as supporting the rationality of the statute at issue.

Quite to the contrary, the eighteen-year rule for public charges demonstrates that the state's alleged interest in protecting against stale and fraudulent claims can only be a pretext for an underlying invidious discrimination against illegitimate children. It establishes the emptiness of Tennessee's rationale for limiting the claims of illegitimate children.[14/]

14/ It also establishes a separate, but equally unconstitutional, discrimination among illegitimate children. See Jimenez v. Weinberger, 417 U.S. 628 (1974). The problems of proof surrounding a paternity action do not necessarily mean that a "blanket and conclusive exclusion of a subclass of illegitimates is reasonably related to the prevention of spurious claims." Jimenez v. Weinberger, 417 U.S. 628, 636 (1974). See also, Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972). Where "the potential for spurious claims is exactly the same as to both subclasses," Jimenez, 417 U.S. at 636, there is no basis for the statutory distinction. Here, as discussed infra, that potential is the same for both subclasses.

As decided by Mills, the only conceivable justification for discrimination between legitimate and illegitimate children in child support actions is avoiding the "litigation of stale or fraudulent claims." 102 S.Ct. at 1554. Moreover, mere recitation of such a purpose is inadequate; "any" statute of limitation "must be substantially related to" such state interest. 102 S.Ct. at 1554. (Emphasis added.)

In finding that Tennessee's general two-year limitation period for paternity actions met this test, the Tennessee Supreme Court nowhere attempted to reconcile that period with the separate period, nine times as long, applicable to children likely to become public charges. We submit that either the problems of stale or fraudulent claims justify a particular time limit, or they do not. When the Tennessee legislature determined that, for illegitimate children likely to be public charges, there were no problems of staleness or potential fraud that justified a period of

limitation shorter than eighteen years, it determined the necessary outcome of this case. There is nothing in the claims of near-poor or middle class or other children that makes them more fraudulent or difficult to prove or disprove than the claims of poor children.15/

While the public charge provision mitigates the harshness of the two-year rule for some illegitimate children (albeit only at a delayed stage when they become poor), it does nothing for the majority of illegitimate children except to underline the irrationality of the denial of their rights. Is a three-year old child's claim too stale at the same

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15/ If one were to hypothesize a greater potential for fraudulent claims, it might vary according to the fathers' economic circumstances, not the children's. The one exception to such a hypothesis might be the possibility that the worse a child's (and mother's) economic situation, the more likely it would be that the mother's desperation could lead to a false claim. Tennessee's law operates inversely to this latter hypothesis, and without regard to the former hypothesis. In any event, such speculation greatly overstates the danger of false claims, as discussed in the next section, and the Tennessee legislature had no concern about false claims, as discussed in the accompanying text.

time that his fifteen-year old cousin's identical claim is not, solely because the state wants to save its own money? If anything, Tennessee's bi-level system exacerbates any hypothetical staleness problem by requiring, once the child is over the age of two, that his or her claims be deferred until he or she is poor.16/

The only possible conclusion is that staleness was not a concern in framing the statute at issue. Rather, Tennessee's law could embody only two purposes: trying to reduce welfare expenditures, and trying to limit the claims of illegitimate children. Whatever the sources of the latter purpose (an anachronistic or gender-discriminatory desire

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16/ Nor is there any basis for hypothesizing that fraudulent claims would be less likely in the public charge situation. First, the claim for the child liable to be a public charge need not be brought by the welfare authorities; "any person" can bring the suit within eighteen years. T.C.A. § 36-224(2). Second, even when public authorities bring the suit, they of necessity will normally be acting on the basis of the mother's allegation, rather than any independent investigation.

to protect men from claims by illegitimate children; a desire to punish children for the sins of the parents; or a desire to "promote" family life[17/]), both the purpose and its sources are constitutionally flawed. See Mills v. Habluetzel, 102 S.Ct. at 1555, n.8.

A state paternity limitation law must embody a legitimate purpose other than saving welfare funds. It must seek to "ensur[e] that genuine claims for child support are satisfied," a concept that embodies state interests not merely in reducing welfare rolls, but also in seeing that "justice is done." Mills v. Habluetzel, 102 S.Ct. at 1556-57. (O'Connor, J., concurring). Such a motive is wholly foreign to the Tennessee statutory scheme. Further, by requiring the deferral of the claims of children over two until they are poor, the scheme both ill serves the children

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17/ By letting men leave to women the full social and economic responsibility for illegitimate children, the state in fact undercuts rather than promotes family life.

and irrationally serves the state interest in saving welfare costs.

Thus, the Tennessee statutory scheme draws a line on the basis of a consideration (the public purse) that is wholly irrelevant to any conceivable legislative judgment that the passage of time diminishes the quality of proof of paternity. See Matter of Wales v. Gallan, 61 Misc.2d 681, 306 N.Y.S.2d 614 (Fam. Ct. Richmond Co. 1969).

IV. TENNESSEE'S TWO-YEAR STATUTE OF LIMITATIONS DISCRIMINATES AGAINST ILLEGITIMATE CHILDREN WITHOUT BEING NECESSITATED BY ANY "REAL THREAT OF LOSS OR DIMINUTION OF EVIDENCE OR INCREASED VULNERABILITY TO FRAUDULENT CLAIMS."

The decision below not only failed to recognize that the legislature had, with its 18-year "exception" to the general two-year limitations period, abandoned any concern with spurious claims. It also blew out of proportion the problem of proof of such claims, even in the abstract. We submit that state statutes and decisions that give undue deference to this problem to justify short statutes of

limitations for paternity or support claims by illegitimate children, while tolling many other limitations periods during minority, merely mask an inappropriate protection of fathers against genuine claims of paternity. As a result, such laws inappropriately continue the discrimination that historically has been directed at illegitimate children, and perpetuate an ethos that the child and mother alone share the blame and should alone suffer the results. Such laws create "an impenetrable barrier that works to shield otherwise invidious discrimination." Gomez v. Perez, 409 U.S. 535, 538 (1973); Mills v. Habluetzel, 102 S.Ct. 1549, 1551 (1982). The assumptions underlying the Tennessee Supreme Court's analysis are typical of such an approach, relying on misconceptions and archaic views of paternity proceedings.

A statute of limitations that cuts off child support for illegitimate children at an age when legitimate children receive support may be upheld, if at all, only if "suffi-

ciently long to present a real threat of loss or diminution of evidence, or an increased vulnerability to fraudulent claims." Mills v. Habluetzel, 102 S.Ct. 1549, 1554-55 (1982).[18] But to measure the extent of the "real threat," if any, requires a thorough scrutiny of how evidence of paternity is created and refuted.

Yet the Tennessee Supreme Court paid no attention whatsoever to the actual nature of the evidence in paternity proceedings. In other types of cases, statutes of limitations serve to protect against stale claims, the faded memories of witnesses, loss of evidence, and death or disappearance of witnesses.[19]

18/ See Oregon v. Bradley, supra, 650 P.2d at 96 (quoting Mills, supra, 102 S.Ct. at 1554, with emphasis) (initiation of paternity action six years after birth does not present "real threat of loss or diminution of evidence, or an increased vulnerabilty to fraudulent claims").

19/ The death and disappearance of witnesses would be rare in a paternity case with respect to the two crucial witnesses, the mother and putative father. The presence of the putative father contributes substantially to the reliability of the fact-finding process and serves at the outset to discourage false claims.

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Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945). But few, if any, other types of cases contain as a key evidentiary element a simple scientific test, of very high probative value, that does not deteriorate over time. Paternity cases do involve such an element -- blood tests and increasingly, other types of scientific tests.[20/] As a result,

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Lalli v. Lalli, 439 U.S. 259, 271-2 (1978). If the mother has died or disappeared, the child would be liable to become a public charge and thus the Tennessee statute of limitations would be eighteen years. Indeed, in this last situation, the death or disappearance of one key witness triggers a much longer statute of limitations, further demonstrating the utter irrationality of the Tennessee law.

20/ Such tests performed by qualified experts, "[u]nlike other evidence . . ., are difficult to refute." Little v. Streater, 452 U.S. 1, 14 (1981). Despite popular misconceptions, they are extremely reliable. S. Rep. No. 1356, 93d Cong., 1st Sess. 52 (1974), reprinted in [1974] U.S. Code Cong. & Ad. News 8155-56. See also Castillo, "New Use of Blood Test is Decisive in Paternity Suits," N.Y. Times (June 2, 1981) ("HLA testing can now yield 'negative' evidence ruling out 99.9 percent of falsely accused men" and "also yield strong 'positive' evidence . . . of 'plausibility of paternity,'" usually greater than 95 percent); Terasaki, "Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing," 16 J. Family L. 543 (1978) (blood and genetic tests exclude up to 99% of possible

(footnote cont'd)

paternity proceedings are "unique." Little v. Streater, 452 U.S. 1, 6 (1981). The key evidence does not become stale or less probative over time. "The State's concern about stale and fraudulent claims is substantially alleviated by recent scientific developments in blood testing dramatically reducing the possibility that a defendant will be falsely accused of being the illegitimate child's father." Mills v. Habluetzel, 102 S.Ct. 1549, 1557 n.2 (1982) (O'Connor, J., concurring).21/

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non-fathers); Stroud, "Paternity Testing: A Current Approach," Trial 46 (September, 1980) (routine exclusion rate of 95 to 98 per cent); Keiter, "Advances in Anthropological Paternity Testing," 21 Am. J. Phys., Anthropology 81 (1963) (99.73 - plus probability in 19 out of 20 cases); Taub, "Medical and Legal Developments in Paternity Testing," Law Medicine and Health Care 8 (October, 1981) (HLA testing casts serious doubt on need for any statute of limitations).

21/ See also Oregon v. Bradley, supra, 650 P.2d at 96 & n.9 ("Recent scientific developments in blood testing dramatically reduce the possibility that the defendant will be erroneously determined to be an illegitimate child's father"); In the Matter of M.D.H., supra, 437 N.E.2d at 129 ("recent scientific advances in blood testing and tissue analysis have simplified considerably the evidentiary problems in paternity cases");

(footnote cont'd)

Indeed, if a state were truly concerned with proof of paternity problems, it could express that concern in a variety of more carefully tuned ways than cutting off causes of action entirely after artificially short time periods. The primary expression will normally come through the burden of proof, a much more appropriate mechanism than an absolute bar. See Glona v. American Guarantee and Liability Insurance Co., 391 U.S. 72, 76 (1968).22/

Second, Tennessee could utilize other ways of encouraging prompter claims, such as, perhaps, limiting the right to retroactive child support. The problem of "stale" causes of action relates to such back support:

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County of Lenoir, supra, 264 S.E.2d at 821 (questioning the need for a paternity statute of limitations "in light of advances which have recently been made in blood typing").

22/ See also Krause, "Legitimate and Illegitimate Offspring of Levy v. Louisiana - First Decisions on Equal Protection and Paternity," 36 U. Chi. L. Rev. 338, 349-53 (1969).

> An action to determine paternity is not a stale claim when employed as a prerequisite to an illegitimate's obtaining of continuing, recurring support. This right has never become dormant, and for the statute of limitations to act to preclude this right on the basis that it is stale is illogical.
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>
> The only proper application of the statute of limitations to child support claims would be to those claims that have accrued in the past but which are not adjudicated. The state could properly say that a claim for child support not made within a certain time after it accrued is barred. However, since the duty of support continues throughout the minority of the child, new causes of action are being created each day that the natural father does not provide support. This duty of future support cannot be barred for illegitimate children if it is allowed for legitimate children.

State of Florida, Department of Health and Rehabilitative Services v. West, 378 So.2d 1220, 1227-28 (Fla. 1979).

Thus, while blood tests and similar evidence may not be dispositive, they make the determination in a paternity proceeding more reliable than that in most other proceedings. Any residual problems of stale evidence can be

handled through mechanisms more tailored to the problems than short statutes of limitations. Nevertheless, the Tennessee legislature responded to the problem by making the limitations period shorter than that for many other causes of action, and the Tennessee Supreme Court in turn wholly ignored the existence of blood tests and implicitly assumed a very high degree of unreliability in paternity proceedings. The gap between reality and Tennessee's responses, much like the actions of Texas considered last year, makes it "fair to question whether the burden placed on illegitimates is designed to advance permissible state interests." Mills v. Habluetzel, 102 S.Ct. 1549, 1557 (1982) (O'Connor, J., concurring). More likely, the state's design was to perpetuate the damage to those who have suffered "through the ages society's 'illogical and unjust' condemnation." Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972). Tennessee's statute does not meet the tests set forth by this Court in Mills.

CONCLUSION

The judgment of the Tennessee Supreme Court should be reversed.

Respectfully submitted,

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January 20, 1983

No. 82-5576-ASX
Status: GRANTED

Title: Jeffrey Lee Pickett, etc., et al., Appellants
v.
Braxton Brown, et al.

Docketed:
October 18, 1982

Court: Supreme Court of Tennessee,
Western Division

Counsel for appellant: Horne,Harold W., Lenhoff,Donna R.

Counsel for appellee: McGarrh Jr.,James R., Terry,Michael E., Littleton, Jr.,Robert B.

Entry	Date	Note	Proceedings and Orders
1	Oct 18 1982	G	Statement as to jurisdiction and motion for leave to proceed in forma pauperis filed.
3	Nov 19 1982		Motion of appellee State of Tennessee to dismiss or affirm filed.
4	Nov 18 1982		DISTRIBUTED. December 3, 1982
6	Dec 6 1982		PROBABLE JURISDICTION NOTED.
			**********
7	Dec 27 1982	G	Motion of appellants for appointment of counsel filed.
8	Dec 28 1982		DISTRIBUTED. Jan. 7, 1983. (Above motion).
9	Jan 10 1983		Motion for appointment of counsel GRANTED and it is ordered that Harold W. Horne, Esquire, of Memphis, Tennessee, is appointed to serve as counsel for the appellants in this case.
10	Jan 10 1983		Joint appendix filed.
11	Jan 20 1983		Brief of appellants Jeffrey Lee Pickett, etc., et al filed.
12	Jan 20 1983	G	Motion of Children's Defense Fund, et al. for leave to file a brief as amici curiae filed.
13	Feb 22 1983		Motion of Children's Defense Fund, et al. for leave to file a brief as amici curiae GRANTED.
14	Feb 18 1983		Record filed.
15	Feb 18 1983		Certified copy of transcript of record received.
16	Mar 4 1983		Brief of appellee Willim M. Leech, Jr. filed.
17	Mar 24 1983		SET FOR ARGUMENT. Wednesday, April 27, 1983. (1st case) 1 hour
18	Mar 24 1983		CIRCULATED.
19	Apr 27 1983		ARGUED.